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Vol 2322
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Nos. 9994 and 9995

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**THE CITIZENS NEWS COMPANY, A CORPORATION,
RESPONDENT**

**ON PETITIONS FOR THE ENFORCEMENT OF ORDERS OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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**In the United States Circuit Court of Appeals
for the Ninth Circuit**

Nos. 9994 and 9995

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE CITIZEN-NEWS COMPANY, A CORPORATION

RESPONDENT

ON PETITIONS FOR THE ENFORCEMENT OF ORDERS OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

These cases are before the Court upon petitions filed by the National Labor Relations Board for the enforcement of separate orders issued by it, pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, U. S. C. Supp. V, Title 29, Sec. 151, *et seq.*), against The Citizen-News Company, a corporation. This Court has jurisdiction of the proceedings under Section 10 (c) of the Act. The unfair labor practices here involved occurred in the State of California within this judicial circuit.

The pertinent provisions of the Act are set out in the appendix to this brief, *infra*, p. 32.

STATEMENT OF THE CASE¹

Proceedings before the Board

Upon proceedings had pursuant to Section 10 of the Act² the Board, on March 26, 1940, issued its decision and order in a case known upon the Board's records as No. C-947³ and upon the records of this Court as No. 9994 (A. R. 123-146). Upon further proceedings⁴ the Board, on July 16, 1941, issued its decision, in a case known upon the Board's records as No. C-1790⁵ and upon the records of this Court as No. 9995 (R. 83-114).

The findings of fact, conclusions of law and orders may be briefly summarized as follows:

1. *Nature of respondent's business.*—Respondent, a California corporation, having its principal office and place of business at Hollywood, California, is engaged

¹ By stipulation and upon order of the Court, No. 9994 and No. 9995 have been consolidated. References to the record in No. 9994 are designated by the symbol "A. R."; those in No. 9995 by the symbol "R."

² These included charges and amended charges filed by the Los Angeles Newspaper Guild (herein called the Guild): complaint of the Board (A. R. 1-10); answer of respondent (A. R. 10-28); hearing before a Trial Examiner of the Board; Intermediate Report of the Trial Examiner (A. R. 29-87) and exceptions to the Intermediate Report by the Guild and respondent (A. R. 87-122). Oral argument before the Board was requested and granted but only the Guild appeared at the scheduled hearing.

³ 21 N. L. R. B. 1112.

⁴ These included charges and amended charges filed by the Guild; complaint (R. 1-8); answer (R. 9-21); hearing before the Trial Examiner; Intermediate Report of the Trial Examiner (R. 22-47) and exceptions thereto (R. 47-82). Oral argument before the Board was requested and granted but only the Guild appeared at the scheduled hearing.

⁵ 33 N. L. R. B., No. 100.

in the publication of a daily newspaper, the Hollywood Citizen-News, as well as in job printing for commercial establishments and other newspapers (A. R. 169-171).⁶ The extra-state circulation of the Citizen-News totals one-half of one percent of the approximately 26,000 copies distributed (A. R. 171-173, 220-221). The paper uses approximately 350 tons of newsprint per month, which is shipped from British Columbia, Canada; its cost constitutes 20 percent of all of respondent's expenses and 10 percent of the cost of publishing the Citizen-News (A. R. 198-202, 214-220). Over 21 percent of the printed matter in the paper consists of items transmitted from outside the state to the Citizen-News which has at its plant teletype machines maintained by the Associated Press, of which it is a member, and of the United Press, to which it subscribes (A. R. 172-181, 188-191, 228). It also subscribes to numerous syndicated services which supply materials originating outside the State, which make up 17 percent of the reading matter of the paper (A. R. 191-194, 228). In addition, national advertising provides 10 percent of the total advertising revenue of the paper and over 5 percent of respondent's total revenue (A. R. 197, 222).

2. *Unfair labor practices.*—In No. 9994 the Board found that from 1936 to 1938 respondent repeatedly interfered with, restrained, and coerced its employees in the exercise of their rights in violation of Section 8

⁶ In No. 9995 respondent admitted in substance, in its answer and at the hearing, the jurisdictional facts alleged in the complaint (R. 2-3, 9, 132-133). The references below to the record in No. 9994 are given to support the Board's jurisdictional findings in that case.

(1) of the Act by criticizing and disparaging the Guild, criticizing the use of outside negotiators, attempting to secure contracts with employees' committees in its various departments, threatening to cut the wages of the employees who failed to sign such contracts, and threatening to discharge employees if a contract with the Guild was consummated (A. R. 128-135).⁷ In No. 9995, the Board found that after the Guild had called a strike of its members in May 1938 because of a current labor dispute over the alleged discriminatory discharges and refusal to bargain, respondent again interfered with, restrained, and coerced its employees in violation of Section 8 (1) by depriving those who had been out on strike of their by-lines because of their participation in the strike and by anti-union statements made by three of its supervisory employees (R. 90-93); the Board further found that by discharging one of its employees, Leonard Lugoff, on March 30, 1940, respondent discriminated in regard to his hire and tenure of employment, in violation of Section 8 (3) and (1) of the Act (R. 93-105).⁸

3. *The Board's orders.*—The orders of the Board require respondent to cease and desist from the unfair labor practices found, to offer reinstatement with back

⁷The Board dismissed the complaint in this case insofar as it alleged that respondent had discriminated against another employee, Karl Schlichter, in violation of Section 8 (3) (R. 105-109, 114).

⁸The Board dismissed the complaint in this case insofar as it alleged that respondent had discriminated against four employees in violation of Section 8 (3) of the Act and refused to bargain with the Guild in violation of Section 8 (5) of the Act (A. R. 135-143, 145).

pay to Leonard Lugoff, to restore to the strikers the by-lines of which they were deprived following the strike, and to post appropriate notices (A. R. 145-146; R. 112-114).

SUMMARY OF ARGUMENT

I. Upon the undisputed facts the National Labor Relations Act is applicable to respondent.

II. The Board's findings of fact are fully supported by substantial evidence. Upon the facts so found, respondent has violated Sections 8 (1) and (3) of the Act.

III. The Board's orders are valid and proper under the Act.

ARGUMENT

POINT I

Upon the undisputed facts, the National Labor Relations Act is applicable to respondent

The Board's findings with respect to the business of respondent (*supra*, pp. 2-3) are based upon undisputed evidence (A. R. 166, 168-231, R. 2-3, 9, 132-133). They clearly establish the Board's jurisdiction under the holding of this Court in *National Labor Relations Board v. Star Publishing Co.*, 97 F. (2d) 465, on very similar facts. See also *Associated Press v. National Labor Relations Board*, 301 U. S. 103; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1; *National Labor Relations Board v. Hearst*, 102 F. (2d) 658 (C. C. A. 9); *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453; *National Labor Relations Board v. Fainblatt*, 306 U. S. 601; *National Labor Relations Board v. Newark Morning Ledger Co.*, 120 F. (2d) 262 (C. C. A. 3), cert. denied

62 S. Ct. 363; *National Labor Relations Board v. A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4).

POINT II

The Board's findings that respondent violated section 8 (1) and (3) of the act are supported by substantial evidence.

A. Respondent's unfair labor practices in violation of section 8 (1) prior to the strike⁹

1. Manifestation of hostility to the Guild and interference in its internal affairs

The first collective activity on the part of the employees here involved occurred in July 1936, prior to the commencement of organization by the Guild, when a group of editorial employees requested a pay increase from Judge Harlan G. Palmer, respondent's president (A. R. 261-263, 393-394). Instead of dealing with them collectively, Palmer arranged individual conferences with them at which he discussed their work in general terms but made no reference to the requested wage increases (A. R. 234, 263-264). This initial attempt at collective efforts having been forestalled, Palmer announced his attitude toward the type of activity which had been attempted in a statement in an issue of "Office Gossip," the mimeographed paper which was distributed to the employees with their pay checks. He informed the employees that grievances about salaries and working conditions should be lodged with department heads, that they would receive "earnest consideration," but that if grievances were disallowed and the employees remained dissatisfied, they should seek em-

⁹ The unfair labor practices discussed under this head were the basis for the Board's findings in No. 9994.

ployment elsewhere (A. R. 265-271, 394). Harwood Young, the paper's business manager, further clarified Palmer's attitude toward the collective efforts of the employees by telling Roger Johnson, an editorial staff employee who complained to him about the ineffectiveness of the conferences, that Judge Palmer was "adverse to taking action under suggestions from pressure groups" (A. R. 243).

In the fall of 1936, the Los Angeles and Citizen-News chapters of the American Newspaper Guild were organized (A. R. 235-238, 271-272). Respondent's officials thereafter made it clear, by disparaging remarks about the Guild, that the Citizen-News looked upon the Guild's organization with even less approval than it had upon the employees' unaffiliated collective efforts.¹⁰ Managing Editor Swisher, for instance, told James Crow, an editorial employee, that "it was bad strategy for the Guild to talk so much about wages and hours" and that it might better talk of "professional standards" (A. R. 396). Swisher also said that he did not see what the Guild had accomplished for its members in its activities elsewhere in the country (A. R. 397). Assistant Business Manager Wynn questioned Roger Johnson about the Guild and told him that "he wondered if the Guild was not paying too much atten-

¹⁰ The supervisory status of Managing Editor Swisher, Assistant Business Manager Wynn, and Display Advertising Manager Brandon, whose activities are discussed herein, was not denied either in the pleadings or at the hearing, and respondent is unquestionably answerable for their activities. *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72, 79, 80; *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 588; *H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514, 520, 521.

tion to the economic rather than the ethical phases" (A. R. 246). Display Advertising Manager Brandon told an employee, Karl Schlichter, that he would be ashamed to belong to an organization which accepted such a settlement as the Guild had procured in a labor dispute in the East (A. R. 282).

Further disparagement and disapproval of the Guild by respondent's supervisory employees was manifested when that organization decided to affiliate with the C. I. O. in June 1937. Swisher questioned the propriety of the affiliation in a conversation with Johnson (A. R. 247); at about the same time he told a number of editorial workers that "the C. I. O. was carrying things too far" (A. R. 391). Brandon, too, discussed with Johnson the disadvantages of unions for "people of the professional class" (A. R. 249).

Brandon's attack on the Guild likewise took more concrete form. He turned the regular meetings of the display advertising men, held almost every morning (A. R. 278, 374), into a forum for denouncing the Guild to the men in the department under his supervision. According to undenied testimony, Brandon reiterated at these meetings the distinction between "white collar workers" and laborers, stating that "white collar workers were caught in the middle between business and laboring people, and that one of these days the white collar workers, like us, are going to get ourselves some guns and shoot those union bastards" (A. R. 278-279). The entire period of these meetings was so frequently spent in discussing unions that at least one employee felt that "there was a definite program of attack on the union" (A. R. 278).

We submit that this campaign of interference in the internal operations of the Guild, of disparagement of its activities, and of belittlement of the advantages which it would secure to its members, was of an unmistakably coercive and hence illegal character. The appeal to the employees as office workers on the ground that they were "professionals" who had no need for organization carried both an indication of management disapproval of Guild membership and an appeal to the employees as a group apart from and superior to industrial workers for whom alone labor organizations were impliedly intended. It cannot be contended that the instant employees, because of the nature of their work, were any less than normally "sensitive and responsive to even the most subtle expression on the part of [their] employer" *National Labor Relations Board v. Griswold Mfg. Co.*, 106 F. (2d) 713, 722 (C. C. A. 3). The white-collar worker, paid no more than the industrial worker, is fully as dependent as the latter on the whim of his employer and as completely subject to his economic control.¹¹

The facts described above show that, from the very inception of Guild activities among its employees, respondent evidenced an "earnest effort and plan to pre-

¹¹ It has been contended, in a proceeding under the New York Labor Relations Act, that white-collar workers—insurance agents—were not entitled to the benefits of that legislation. The Court of Appeals of New York rejected the argument, holding that "the purposes and policy * * * approved [in that act] and the scheme of the act as a whole dispelled all doubt that these agents * * * are employees * * * and entitled to the benefits of the Act." *Metropolitan Life Insurance Co. v. New York State Labor Relations Board*, 20 N. E. (2d) 390, 394.

vent unionization of [its] employees.” *Montgomery Ward & Co., Inc. v. National Labor Relations Board*, 107 F. (2d) 555, 559 (C. C. A. 7). The activities of Palmer, Young, Swisher, and Brandon, were clearly designed to interfere with and discourage their subordinates in their collective undertakings. They constituted an intrusion into a domain foreclosed to the employer under the Act and as such were a violation of Section 8 (1).¹²

Despite his frequently expressed objections to the Guild, Brandon attempted to become a member of that union in October 1937 and asked Roger Johnson to help him (A. R. 252-253). When the Guild members, however, refused to admit him, fearing that he was engaged in an attempt to dominate the organization and his subordinates, the display advertising men, in particular (A. R. 281, 407), Brandon retaliated by insisting that the display men under him report for work on Saturdays thereafter, which they had not previously been required to do (A. R. 375, 408-409). When they protested that there was little work to be done on Sat-

¹² *National Labor Relations Board v. Union Pacific Stages*, 99 F. (2d) 153, 177 (C. C. A. 9); *National Labor Relations Board v. Luxuray, Inc.*, 123 F. (2d) 106, 107-108 (C. C. A. 2); *National Labor Relations Board v. Moench Tanning Co.*, 121 F. (2d) 951, 952 (C. C. A. 2); *National Labor Relations Board v. Remington Rand, Inc.*, 94 F. (2d) 862, 870 (C. C. A. 2); *National Labor Relations Board v. Whittier Mills Co.*, 111 F. (2d) 474, 478-479 (C. C. A. 5); *National Labor Relations Board v. Tex-O-Kan Flour*, 122 F. (2d) 433 (C. C. A. 5); *Singer Manufacturing Co. v. National Labor Relations Board*, 119 F. (2d) 131, 133 (C. C. A. 7); *Colorado Fuel and Iron Corp. v. National Labor Relations Board*, 121 F. (2d) 165, 174 (C. C. A. 10).

urdays, he told them angrily that they could "come Saturday mornings and sit at your desk, keep looking at your desk and smell your own feet stink" (A. R. 375).¹³ The penalty was clearly imposed to retaliate against the employees for an action taken by them to protect their collective activity in the Guild; as such, it constituted a threat to their freedom of activity as members of that organization.¹⁴

The Guild's national convention of June 1937 voted to present to its members the question of the admission of non-editorial employees to its ranks (A. R. 247-248). The officials of the Citizen-News thereupon started questioning the employees as to whether this would result in the organization of respondent's business departments. Managing Editor Swisher, who had asked a number of the editorial employees whether they were Guild members (A. R. 391), discussed the Guild's plans with Johnson and asked Johnson directly whether the Guild was organizing respondent's business department (A. R. 247). This new manifestation of petitioner's concern with the activities of its employees was likewise illegal. It has uniformly been held that interrogation about union membership and the internal workings of a union must

¹³ Brandon was not called as a witness by respondent to deny this testimony or to explain his conduct.

¹⁴ The imposition of discriminatory working conditions upon employees for their activities in a union has been recognized as violative of the Act. *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 251; *F. W. Woolworth Co. v. National Labor Relations Board*, 121 F. (2d) 658, 660 (C. C. A. 2); *Kansas City Power and Light Co. v. National Labor Relations Board*, 111 F. (2d) 340, 348-349 (C. C. A. 8).

be proscribed if the free right to organize is to be guaranteed.¹⁵

Respondent's
2. *Petitioner's attempt to ignore the Guild and bargain with committees of its employees*

Late in June 1937, respondent asked the employees in the several departments of the Citizen-News to form committees to discuss wages, working conditions, and grievances with Judge Palmer (A. R. 249, 272, 399), and submitted proposals on these subjects to the various committees which were formed (A. R. 250). Although the committee representing the employees in the business departments entered into a contract with respondent (A. R. 381, 398), the editorial and classified advertising departments' committees refused to do so (A. R. 273, 384, 399-400). Their refusal was met with attacks upon the Guild which clearly revealed the purpose of Palmer's maneuver. When the editorial department's committee told Palmer that it could not deal with him directly, since that would be violative of the Guild's constitution, Palmer replied angrily, "What is the matter with you people? Don't you know what you want? Can't you make up your own minds? Do you prefer to have someone in Washington or New York or some place else dictate to you? Can't you decide for yourselves? Would you prefer to be

¹⁵ *National Labor Relations Board v. Bradford Dyeing Ass'n*, 310 U. S. 318, 337; *H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514, 518; *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, 75; *National Labor Relations Board v. Sunshine Mining Co.*, 110 F. (2d) 780, 786 (C. C. A. 9); *Texarkana Bus Company, Inc. v. National Labor Relations Board*, 119 F. (2d) 480, 483 (C. C. A. 8).

dictated to by some stranger miles away from you?" (A. R. 273-274). The refusal of the classified advertising employees to sign the proffered contract and their insistence upon being represented by the Guild similarly prompted Business Manager Young to threaten that their department would be affected first if they did not sign the agreement and it became necessary to cut salaries (A. R. 383-385). Young also expressed his objection to non-employee negotiators when he said that using them would "put Judge Palmer in the position of the less reputable publishers" (A. R. 398). Brandon similarly stated that the workers did not understand what they were doing in having "outside negotiators and agitators" come in and work for them (A. R. 451).

~~Petitioner's~~ ^{Respondent's} explosion of resentment at the failure of its plan serves to underline its manifest purpose. The Board properly noted that (A. R. 133):

Thus, while in 1936 the respondent discouraged collective activity, in 1937 after the appearance of the Guild it encouraged the formation of bargaining committees and sought contractual relations with them. It is apparent that the respondent altered its policy of dealing with its employees in order to head off the organizational campaign of the Guild.

The Board's further conclusion that the strategy utilized was illegal (A. R. 135) was entirely proper. A similar attempt to execute contracts directly with employee committees and thus prevent the designation of an outside representative which would prove objectionable to the management has been condemned by the

Supreme Court in *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 359-360.¹⁸ Furthermore, respondent's openly expressed opposition to dealing with non-employee negotiating agents was a plain restraint upon the right of the employees to select their own bargaining representative (see cases cited *supra*, pp. 9-10).

3. Respondent's illegal conduct during bargaining negotiations with the Guild

Between December 22, 1937, and May 13, 1938, respondent held a series of bargaining conferences with the Guild (A. R. 283-354). Although the Board dismissed charges in the complaint that respondent's conduct during that period constituted a violation of Section 8 (5) (A. R. 136), it nevertheless held that certain concurrent activities of respondent's supervisors were in violation of Section 8 (1) (A. R. 135), in that they

* * * were plainly calculated to destroy the prestige of the Guild and inculcate in the minds of the employees the fear that the efforts of their representatives would be profitless (A. R. 134).

After one of the conferences with the Guild negotiators, Managing Editor Swisher remarked to an employee, Selby Calkins, who had been present as an observer, that the "speed up" and "stretch out" did not appear to be bothering him (A. R. 456). Failing

¹⁸ See also *National Labor Relations Board v. Vincennes Steel Corporation*, 117 F. (2d) 169, 171-173 (C. C. A. 7); *National Labor Relations Board v. Superior Tanning Co.*, 117 F. (2d) 881, 890-892 (C. C. A. 7); cf. *F. W. Woolworth Co. v. National Labor Relations Board*, 121 F. (2d) 658, 660 (C. C. A. 2); and cases cited *infra*, p. 16, note 17.

to understand the reference, Calkins asked Swisher to explain it; the editor replied that he referred to a discussion which had occurred during a bargaining conference, and attempted to discuss the negotiations until Calkins requested him not to do so (A. R. 456-457). Subsequently Swisher tried to discuss the negotiations with other employees individually outside the bargaining conferences (A. R. 460-461, 485). Business Manager Young warned Karl Schlichter, one of his subordinates, that the proposals sought by the Guild would force the management to get rid of some employees (A. R. 375-376).

These attempts by respondent's officials to discuss the subject matter of the negotiations with employees who were Guild members show that respondent had not abandoned its aim to arrive at an arrangement with its employees which excluded the Guild, and that in pursuing that aim, respondent was willing to engage in conduct totally incompatible with the kind of bargaining through designated representatives which the Act seeks to guarantee. Bargaining on an equal plane clearly cannot be had while the authority of the representatives whom the employees have designated is undermined by direct communication away from the bargaining table between agents of the employer and their subordinates. Although by this conduct respondent's officials may well have been performing "acts which, normally, could be validly done," such actions are clearly prohibited by the Act where, as this Court has held of a comparable situation, they serve to interfere with, restrain, and coerce employees in the exercise of their rights. *National Labor Relations Board v.*

Grower-Shipper Vegetable Association, 122 F. (2d) 368, 376-377.¹⁷

1. Conclusion as to respondent's activities before the strike

The facts and authorities set forth above show that respondent's entire approach to the collective activity of its employees fell short of the statutory standard. Its supervisors' disparaging remarks about the Guild and the C. I. O. (*supra*, pp. 6-10), their interrogation of the employees about their membership in the Guild and its plans for organizing the paper's business employees (*supra*, pp. 11-12). Brandon's punishment of his subordinates for their refusal to admit him to membership in their union (*supra*, pp. 10-11), and, finally, Palmer's efforts to deal with the employees directly and thereby head off the necessity of dealing with the Guild as their representative (*supra*, pp. 12-16). constituted independent violations of Section 8 (1), which fall into categories which have been frequently recognized by the Board and the Courts. The Board's finding (A. R. 135) that throughout this period respondent repeatedly violated Section 8 (1) of the Act is fully supported.

B. The strike and its settlement

On May 13, 1938, the Guild and respondent reached an agreement on a contract, subject to acceptance by the Guild members (A. R. 342-354). Before the Guild

¹⁷ See also *National Labor Relations Board v. Hopwood Retinning Co.*, 98 F. (2d) 97, 100 (C. C. A. 2); *National Labor Relations Board v. Elkland Leather Co.*, 114 F. (2d) 221, 223-224 (C. C. A. 3), cert. den., 311 U. S. 705; *M. H. Ritzwoller Co. v. National Labor Relations Board*, 114 F. (2d) 432, 435 (C. C. A. 7).

acted, however, respondent discharged five employees (A. R. 357-358). Thereupon the Guild called a strike which commenced on May 17 (R. 359, 365). Charges of unfair labor practices were filed and a complaint was issued by the Board in No. 9994 on June 27, 1938, which alleged that respondent had violated Section 8 (1), (3), and (5) of the Act (A. R. 1-9). After a hearing had been held on this complaint, respondent and the Guild, on July 30, 1938, entered into a strike settlement which provided, *inter alia*, for execution of the contract which had previously been tentatively agreed upon (R. 17-21, 618-626).

By the terms of the settlement respondent also agreed to reinstate the discharged employees as well as the strikers (R. 18) and the Guild agreed: "in the event it is finally determined that the five discharged employees, or any of them, were lawfully discharged, those so affected by such determination shall promptly resign or be subject to discharge." (R. 19.) The settlement further provided that by "final determination" was meant "either the acceptance by both sides of the determination by the National Labor Relations Board or the final determination by any court or courts to which any of the parties to such proceedings may turn the matter." (R. 19.)

On March 19, 1940, the Board handed down its decision in No. 9994, wherein it found that respondent had interfered with, restrained, and coerced its employees by the acts described above (*supra*, pp. 6-16) in violation of Section 8 (1), but that the discharged employees had been legally dismissed for business rea-

sons and that respondent had not refused to bargain collectively with the Guild; accordingly the complaint was dismissed insofar as it alleged violations of Section 8 (3) and (5) of the Act (A. R. 128-143).

C. Respondent's unfair labor practices after the strike ¹⁸

Harmonious relations between the management and the employees of the Citizen-News did not, unfortunately, follow either the strike settlement agreement or the issuance of the Board's order in No. 9994. Respondent continued, as we shall see, to evince its hostility to the collective activity of its employees. In addition, when the Board announced its decision in No. 9994 in March 1940, respondent went beyond the terms of the strike settlement and ousted not only the employees whose discharges had been upheld by the Board but also an additional employee who had refused to follow the leadership of the Guild during the strike but had thereafter rejoined its ranks and become extremely active in its behalf (*infra*, pp. 21-29).

1. Respondent's continued manifestation of hostility to the Guild in violation of Section 8 (1) of the act

When respondent's employees returned after the strike they were almost at once met with the imposition of a discriminatory working condition, established because of their legitimate concerted activity. The editorial employees, whose names had previously appeared on articles which they had written, were denied these "by-lines" after the strike (R. 420). Managing Editor Swisher justified this change of policy on the ground

¹⁸ The unfair labor practices discussed here are the basis for the Board's findings in No. 9995.

that ill will created during the strike had made it difficult for certain readers, particularly advertisers, to see the names of former strikers without becoming alarmed (R. 421). The use of the by-line is regarded by the newspaper man as an honor; as one employee testified, "it is a part of the professional pride of a newspaper man to have his name on a story" (R. 420-421). Respondent's denial of this privilege thus constituted a penalty which could not legally be imposed because of collective activity. (See cases cited *supra*, p. 11, note 14).

The alleged pressure from its advertisers did not justify respondent's discrimination against its union employees. The Act contains no exemptions because the employer may be of the view that the circumstances with which he is confronted will justify its disregard, *Wilson & Co., Inc. v. National Labor Relations Board*, 123 F. (2d) 411, 417 (C. C. A. 8).¹⁹ Moreover the situation here is not that of an employer who faces certain economic loss if he adheres to the law. All that appears is that respondent heard that some of its advertisers found that mention of the names of strikers was distasteful. No threat of economic pressure is shown

¹⁹ See also *National Labor Relations Board v. Star Publishing Co.*, 97 F. (2d) 465, 470 (C. C. A. 9); *National Labor Relations Board v. Sunshine Mining Co.*, 110 F. (2d) 780, 792 (C. C. A. 9), cert. denied, 312 U. S. 678; *South Atlantic Steamship Co. v. National Labor Relations Board*, 116 F. (2d) 480, 482 (C. C. A. 5), cert. denied, 313 U. S. 582; *Clover Fork Coal Co. v. National Labor Relations Board*, 97 F. (2d) 331, 335 (C. C. A. 6); *McQuay-Norris Mfg. Co. v. National Labor Relations Board*, 116 F. (2d) 748, 752 (C. C. A. 7), cert. denied, 313 U. S. 565; *National Labor Relations Board v. Moore-Lowry Flour Mills*, 122 F. (2d) 419 (C. C. A. 10).

to have been conveyed. The Act cannot be set aside merely because an employer chooses to please his customers.

After the strike, respondent's officials continued to make disparaging statements about the Guild not unlike those which were found to constitute a violation of the Act in No. 9994 (*supra*, pp. 6-10). Patricia Killoran, a former striker, was criticized for her striking activities by several of her superiors. When on one occasion she was explaining her failure to cover an assignment, Business Manager Young replied: "How could I believe anything after all the things that you have done?" (R. 356). When Killoran charged that Young was referring to her Guild activities, he said: "Well, as a matter of fact, I can't talk about those things because I am not allowed to" (R. 356). He nevertheless went on to say that his brother had been a very active union man, that he knew more about unions than she ever would; that he knew about good unions, but that in view of what the Guild had done, she could not be trusted (R. 356). After the strike, Managing Editor Swisher also remarked to Killoran that the Guild was not a reputable organization (R. 384). Herbert Sternberg, respondent's advertising manager, vehemently criticized Killoran's Guild activity shortly after the strike, telling her what a fool she was and how bad the C. I. O., the Guild, and the strikers were (R. 403). Young, Swisher, and Sternberg were not called upon to deny Killoran's testimony, which clearly shows, as the Board found (R. 93), continued interference, restraint, and coercion on the part of respondent.

2. The discriminatory discharge of Leonard Lugoff

By the discriminatory discharge of Leonard Lugoff on March 30, 1940, respondent displayed its hostility toward the Guild in more concrete form. Lugoff was an advertising solicitor who had worked for the Citizen-News from November 1931 to September 1932 and from January 1934 until his discharge in March 1940. He had previously been employed by other Hollywood newspapers in the same capacity (R. 181-185). He joined the Guild in October 1937, but when he failed to respond to the 1938 strike call, he was expelled by that organization (R. 187).

In August 1938, before going on his vacation, Lugoff considered borrowing some money. Because his sales had dropped during the strike, he asked his superior, respondent's classified advertising manager, Tobin, whether there was any doubt about his job being continued (R. 188). Tobin assured him that there was nothing to worry about and Lugoff proceeded to make the loan (R. 188, 551). Nevertheless, on August 19, 1938, he was discharged by Tobin purportedly because of his low sales production record (R. 179, 188, 428). Lugoff complained to Tobin that the latter had misled him, and, on August 22, 1938, he carried his appeal to Judge Palmer, informing him that he had contracted the debt in reliance upon Tobin's statement that his position was secure. He also told Palmer that he had given up his membership in the Guild (R. 189-190, 197).²⁰ Palmer consulted with Business Manager

²⁰ Palmer's conflicting version of this conversation is discussed below (pp. 25-26).

Young, who thereafter sought out Lugoff where he was waiting in the plant and handed him a notice of reinstatement which read as follows (R. 191-194):

HOLLYWOOD CITIZEN-NEWS,

August 22, 1938.

To: Mr. Lugoff

Subject:

You will be retained in your present position, with final decision to be made on January 1, 1939. The intervening period will be probationary.

T. H. YOUNG,
Business Manager.

The specified period and an additional 15 months passed without any word to Lugoff that his probation had not been satisfactory (R. 194, 286-287); it is, therefore, clear that the "final decision" reached on January 1 was to retain him as an employee.

In February 1939, Lugoff again joined the Guild, which at that time had only one other member in the classified advertising department (R. 194-195). He undertook the organization of respondent's business employees, a project, it will be recalled, in which the management had shown great interest from the time when the Guild first opened its doors to them (*supra*, pp. 11-12). Thus, in May he attempted to persuade them to sign a petition authorizing the Guild to represent them although not requiring them to become members (R. 195-197, 261, 263-264, 411-414). In June 1939, he proposed to Business Manager Young the establishment of a guaranteed weekly wage for the classified advertising employees (R. 197-199, 287). On this occasion Lugoff told Young that in his opinion "unions usually came in [sic] existence because of dissatisfaction among em-

ployees about working conditions and wages," and succeeded in procuring Young's permission to submit a recommendation for a guaranteed wage; such a guarantee was established by Young soon afterward (R. 288, 293, 339-341). From July 19, 1939, until the time of his discharge Lugoff frequently attended conferences with respondent's officials as a member of a Guild committee (R. 213, 225, 323). His militance in behalf of that organization was conspicuously displayed in August when he engaged in an argument with another employee whom he charged with spreading a rumor that the management was going to close down the plant if the Guild were not reasonable in its negotiations for a new contract (R. 216-220, 314-320). George Palmer, classified credit manager, who is the nephew of Judge Palmer and the son of one of respondent's owners, was present during this dispute, and intervened to remark that he knew that the rumor was true and was "willing to gamble on it" (R. 218-219, 225). Shortly before his discharge, in March 1940, Lugoff circulated another petition, this time not only among employees whom he thought to be sympathetic toward the Guild, but among practically all those in the classified advertising department (R. 226-229, 329-331).

On March 26, 1940, the Board's decision in No. 9994 was issued, finding that the employees named in the complaint had not been discriminated against (*supra*, pp. 17-18; A. R. 136-143; R. 581-582); accordingly, on March 30, those who remained in respondent's employ were discharged under the terms of the strike settlement agreement (*supra*, p. 17, R. 142-145). On the same day, Lugoff received a special delivery letter dis-

charging him on the ground that his production did not justify his employment (R. 146-148, 236).²¹

Lugoff's activities in organizing the classified advertising employees were known to respondent.²² His open circulation of the petition in May 1939 had admittedly come to Tobin's attention (R. 359, 411-412, 479-480, 511). In view of respondent's outspoken aversion to the Guild (*supra*, pp. 18-20) and Lugoff's conspicuous activities in its behalf, only a satisfactory showing that the discharge was prompted by legal considerations could overcome the clear implication that respondent had seized upon the dismissal of the other employees under the terms of the strike settlement agreement as an opportunity for ridding itself of an ardent supporter of the Guild. Respondent, we submit, has made no such satisfactory showing.

Respondent gives two primary reasons for Lugoff's discharge: first, that he was reinstated after his discharge in 1938 on the same conditions as were the employees who were reinstated pursuant to the strike

²¹ The letter read, in full, as follows (R. 148):

DEAR MR. LUGOFF:

This notice is to terminate your services with us effective this day. Your production does not justify your employment.

Yours very truly,

Publisher.

²² When Judge Palmer was asked at the hearing whether he knew that Lugoff was a member of the Guild at the time of his discharge, he replied, "I had reason to believe that Mr. Lugoff was a member of the Guild * * * because I had seen Mr. Lugoff attending a Guild meeting" (R. 146).

settlement agreement (R. 143-145) (*supra*, p. 17), and second, that his services had not proved satisfactory after his reinstatement (R. 148).

The first of these grounds rests on Palmer's testimony about his conversation with Lugoff at the time of his reinstatement in 1938. Palmer testified that Lugoff had protested his discharge in 1938 not on the ground that he had contracted a loan (*supra*, p. 21), but on the ground that it was unfair to reinstate strikers and yet to dismiss a man who had remained on the job (R. 142-145, 162). According to his version, he consulted with Young and agreed that Lugoff should be given equal consideration with the strikers (R. 143). The Board rejected this testimony as inconsistent with the available facts (R. 96-99).

Palmer's explanation does not account for the fact that the letter given to Lugoff when he was reinstated in 1938 makes no mention of the strike settlement, and recites that Lugoff's "probationary" period is to terminate on January 1, 1939, rather than on the date of the Board's anticipated decision. Respondent's attempt to alter the terms of this written instrument by an alleged additional oral condition, providing that if the discharged employees were not reinstated by the Board he, too, was to go, is thus extremely unpersuasive. Furthermore, Palmer admitted that he never took the natural step of conveying the alleged condition upon his reinstatement to Lugoff (R. 144), and the testimony of Young, who apprised Lugoff of his reinstatement by handing him the letter described above, shows that nothing was said about the alleged condition at that time (R. 343). Thus the condition

was imposed, if at all, by an undisclosed and unilateral act. The document, on the other hand, is fully consistent with Lugoff's testimony that he did not even know the terms of the strike settlement agreement (R. 285), but had placed his protest solely upon the debt which he had incurred, and that reinstatement had been granted him for this reason after Judge Palmer had given him the choice of getting his job back or having the Company pay the loan (R. 190-191).

Likewise inconsistent with Palmer's testimony and wholly consistent with that of Lugoff is the fact that the letter informing Lugoff of his discharge in 1940 cites only Lugoff's production record and makes no mention of the recently issued decision of the Board (*supra*, p. 24). Finally, Tobin admitted that before his discharge Lugoff had mentioned the prospective loan and sought reassurance that his job was secure (R. 427-429, 515). It is conceded that Lugoff in fact did make the loan (R. 551). Thus the surrounding admitted facts all support Lugoff's version.

In sum, respondent's first ground for the discharge is wholly discredited by the record and was properly rejected by the Board (R. 99). Indeed, Judge Palmer, at the hearing, insisted that notwithstanding the alleged condition subjecting his reinstatement to the terms of the strike settlement agreement, Lugoff would have been retained if his work had not proved unsatisfactory (R. 583-584). Hence, it is upon his purportedly unsatisfactory services after his reinstatement in 1938 that respondent relies as its real motive for dismissing him along with the reinstated employees. To this second asserted offense we now turn.

It should be noted at the outset that Lugoff's "probationary" period, as announced in the letter given to him in 1938 (*supra*, p. 22), expired on January 1, 1939. Respondent failed to indicate at the end of that period that Lugoff's performance was not satisfactory; accordingly, his employment returned to its original basis. At no time between his reinstatement in 1938 and his discharge in 1940 was his efficiency questioned (R. 194, 286-287). It was not until 15 months later that respondent again raised the question of inefficiency, and then its specifications of that charge rested almost exclusively on events of two years or more earlier. This resurrection of grievances which, if they had any basis, had long been condoned, points strongly to the conclusion that respondent was advancing pretexts to conceal its true motives for the discharge.²³

Lugoff's sales production was second highest among respondent's four outside salesmen at the time of his discharge (R. 201-209, 299, 476-477, 509-510). Respondent nevertheless contends that his production was inadequate and points to the fact that his sales decreased more pronouncedly from 1937 to 1939 than did those of the other salesmen (R. 467-468, 477). The decrease in Lugoff's production, however, which occurred

²³ See *National Labor Relations Board v. Arcade Sunshine Co.*, 118 F. (2d) 49, 51 (App. D. C.), cert. denied, 313 U. S. 567; *Hartsell Mills Co. v. National Labor Relations Board*, 111 F. (2d) 291, 292-293 (C. C. A. 4); *Agwilines, Inc. v. National Labor Relations Board*, 87 F. (2d) 146, 154 (C. C. A. 5); *New York Handkerchief Mfg. Co. v. National Labor Relations Board*, 114 F. (2d) 144, 147 (C. C. A. 7), cert. denied, 311 U. S. 704; *Hamilton-Brown Shoe Co. v. National Labor Relations Board*, 104 F. (2d) 49, 53 (C. C. A. 8).

early in the spring of 1938, was fully explained; it did not result from his inefficiency but from the loss of three accounts, two of which moved outside his territory (R. 594-596).²⁴

The further contention that Lugoff was discharged because he failed to make the minimum guaranteed wage of \$24 a week which his collective efforts had succeeded in having established (*supra*, pp. 22-23) cannot reflect a serious reason for dismissing him. He received the lowest pay rate of any of the outside salesmen and since its establishment in July, 1939, he, as well as other employees, had frequently failed to make the guarantee (R. 199-200, 213, 485-486, cf. 341-342). Lugoff denied that he had been warned that he would be required to equal the guaranteed salary with his commissions (R. 200, 213, 294) and the Board credited his denial (R. 103). Indeed, the purpose of establishing the guarantee was to secure a minimum wage notwithstanding the production of the salesmen.²⁵

In short, respondent's explanation of its discharge of Lugoff is entirely unconvincing. No extensive citation

²⁴ Respondent makes a further effort to support its charge of inefficiency against Lugoff on the ground that one Sellers, an inexperienced salesman who succeeded him, soon equalled his advertising sales (R. 240, 460-465). But the unpersuasiveness of this argument is established by Tobin's own testimony that experience is not an important factor in selling advertising (R. 519-520). Sellers' sales did not exceed those of Lugoff, which they would have done had Lugoff been lax in his work, as claimed (R. 457).

²⁵ Respondent advances several additional miscellaneous grounds for discharging Lugoff, to wit, failure to call on clients and gambling and sleeping during working hours. These claims do not find support in the record as the true reasons for his dis-

of cases is necessary to show that the Board could properly reject that explanation and deduce the true motive from respondent's hostility to the Guild and Lugoff's renewed activity on behalf of that organization.²⁰ As the Circuit Court of Appeals for the Fourth Circuit has held, the Board is not required, merely because a salesman's production has fallen, to accept an employer's reliance on that fact as a defense to a charge of discrimination, particularly where, as here, even his lowered production equalled that of other employees similarly situated: *National Labor Relations Board v. Schmidt Baking Co.*, 122 F. (2d) 162, 164. The Board's conclusion that Lugoff was in fact discharged for organizational activities which were objectionable to respondent has ample support in the evidence.

POINT II

The Board's orders are valid and proper under the act

The orders of the Board require respondent to cease and desist from the unfair labor practices found, to

charge (cf. R. 211, 221-222, 309-314, 341, 430, 526). This is particularly true in view of the fact that all these supposed misdeeds occurred and were known to respondent's officials long before the discharge (R. 447, 527).

²⁰ *National Labor Relations Board v. Bradford Dyeing Association*, 310 U. S. 318, 326-333; *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 602. The Courts consistently look with suspicion upon allegations of inefficiency made for the first time after employees have aroused the hostility of their superiors by becoming active in behalf of a union. See *National Labor Relations Board v. Torrea Packing Co.*, 111 F. (2d) 626, 629 (C. C. A. 9), cert. denied, 311 U. S. 668; *Aguilines, Inc. v. National Labor Relations Board*, 87 F. (2d) 146, 154 (C. C. A. 5); *Southern Colorado Power Co. v. National Labor Relations Board*, 111 F. (2d) 539, 544 (C. C. A. 10).

reinstate Lugoff with back pay, to restore to the strikers the by-lines of which they were deprived, and to post notices (A. R. 145, R. 112-114). These requirements are the appropriate ones to remedy the unfair labor practices found. *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265; *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 600; *National Labor Relations Board v. Sunshine Mining Co.*, 110 F. (2d) 780 (C. C. A. 9).

The varied and continued violations of Section 8 (1) which are the essence of these cases demand that respondent be required to cease and desist from "in any other manner interfering with, coercing, or restraining its employees." The propriety of this form of the order where the facts disclose such "a course of * * * conduct in the past" as constitutes a "threat of continuing and varying efforts" to interfere with the employees' organizational rights was established in *National Labor Relations Board v. Express Publishing Company*, 312 U. S. 426, at pp. 437, 438.²⁷ The language is peculiarly appropriate here, where the "course of conduct" continued after the commencement of the first proceeding against respondent and culminated, after the Board had ordered respondent to cease and desist

²⁷ See also *National Labor Relations Board v. Pacific Gas and Electric Co.*, 118 F. (2d) 780, 789 (C. C. A. 9); *National Labor Relations Board v. Grower-Shipper Vegetable Assn.*, 122 F. (2d) 368 (C. C. A. 9); *National Labor Relations Board v. National Motor Bearing Co.*, 105 F. (2d) 652, 661 (C. C. A. 9); *National Labor Relations Board v. Reed & Prince Mfg. Co.*, 118 F. (2d) 874, 890-891 (C. C. A. 1, cert. denied, 313 U. S. 595); *Woolworth Co. v. National Labor Relations Board*, 121 F. (2d) 658 (C. C. A. 2); *National Labor Relations Board v. Air Associates, Inc.*, 121

from its illegal practices in a “discriminatory discharge * * * [which] goes to the very heart of the Act.” *National Labor Relations Board v. Entwhistle Mfg. Co.*, 120 F. (2d) 532, 536 (C. C. A. 4).

CONCLUSION

It is respectfully submitted that the Board’s findings are supported by substantial evidence, that its orders are valid and proper, and that a decree should issue affirming and enforcing the orders as requested in the Board’s petitions for enforcement.

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MARCH 1942.

F. (2d) 586 (C. C. A. 2); *Oughton v. National Labor Relations Board* (opinion sur settlement of decree), April 4, 1941 (C. C. A. 3); *National Labor Relations Board v. New Era Die Co.*, *ibid.* (C. C. A. 3); *National Labor Relations Board v. Pilling*, *ibid.* (C. C. A. 3); *American Enka Corp. v. National Labor Relations Board*, 119 F. (2d) 60 (C. C. A. 4); *National Labor Relations Board v. Reynolds Wire Co.*, 121 F. (2d) 627 (C. C. A. 7); *Bethlehem Steel Corp. v. National Labor Relations Board*, 120 F. (2d) 641 (App. D. C.).

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. V. Sec. 15 *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *

IN THE
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

THE CITIZEN NEWS COMPANY, RESPONDENT.

ON PETITION FOR ENFORCEMENT OF ORDERS OF THE
NATIONAL LABOR RELATIONS BOARD

**BRIEF FOR INTERVENORS, LOS ANGELES
NEWSPAPER GUILD AND LEONARD LUGOFF**

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FILED

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IN THE
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Nos. 9994 and 9995

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

THE CITIZEN NEWS COMPANY,

Respondent.

ON PETITION FOR ENFORCEMENT OF ORDERS OF THE
NATIONAL LABOR RELATIONS BOARD

Order Permitting Intervention

Pursuant to order of this Court, the intervenors have been permitted as interested parties, to file a brief in support of the petition of the National Labor Relations Board for enforcement of its orders against the respondent.

Summary of the Cases

Two petitions of the National Labor Relations Board are before this Court for enforcement.

The first (9994) seeks enforcement of the Board's order directing the respondent to cease and desist from "interfering with, restraining, or coercing its employees in the exercise of the right * * * to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing * * *" pursuant to Section 7 of the National Labor Relations Act (R. 148).

The second (9995) seeks enforcement of an order directing the respondent to cease and desist, as above stated, and from discouraging membership in the Los Angeles Newspaper Guild, from discriminating in regard to hire and tenure of employment of any of its employees, and to reinstate Leonard Lugoff, whom the Board found had been discharged because of union activity (R. 117).

The respondent, a California corporation, publishes a daily newspaper in Hollywood known as the Citizen-News, as well as other publications, and operates a job printing service (9994, R. 170).

Questions Presented

Upon these petitions for enforcement, four questions are presented. They are:

1. Whether the business conducted by the respondent bears a close and intimate relation to interstate commerce and whether an unfair labor practice of the respondent affects such commerce.
2. Whether the Board's orders, which are sought to be enforced (9994, R. 146-150; 9995, R. 115-120) would deprive respondent of freedom of speech and press under Amendment I to the Constitution of the United States.
3. Whether such orders which require the respondent to post notices stating that it will cease and desist as

hereinabove indicated, violate the due process clause of Amendment 5 to the Constitution of the United States.

4. Whether the Board's orders are based upon substantial evidence.

Conceded Facts

The Los Angeles Newspaper Guild had been designated as the representative of the editorial employees of the Citizen-Union for the purpose of collective bargaining with respondent (9994, R. 6, 17).

Respondent's publications are circulated entirely within the State of California, except that the Citizen-News, whose daily circulation is in excess of 26,000, sends about 125 daily copies outside the State (9994, R. 170-172; 9995, R. 2-3, 9).

Respondent imports from outside the state 350 tons of newsprint a week (9994, R. 216; 9995, R. 3, 9, 134). The cost of this newsprint constitutes 20% of the total expenses of all of the respondent's publications (9994, R. 219; 9995, R. 3, 9).

The Associated Press and the United Press service the Citizen-News. Both services together supply out-of-state news to the extent of 21% of the paper's total reading matter, although such out-of-state news is received through the California offices of both news services (9994, R. 173-174, 181, 183-184, 188-190; 9995 R. 2, 9).

Eleven feature syndicates supply about 17% of the paper's total reading matter, all of which comes from outside the state (9994, R. 191-193, 228; 9995, R. 2, 9).

With the qualification that Associated and United Press news comes through the California offices of these agencies, the Citizen-News contains daily about 38% of

out-of-state news. This material is received by wire, teletype, wireless and mail (9994, R. 173-174, 181, 183-184, 188-190; 9995, R. 2, 9).

The Associated Press has the privilege of using any other news appearing in respondent's paper, and of transmitting such news through its California office to out-of-state points (9994, R. 176, 180-181; 9995, R. 2, 9).

About 10% of respondent's advertising revenue, which represents more than 5% of its total revenue, comes from advertising originating outside the State of California (9994, R. 197; 9995, R. 2, 9). A list of advertisers is contained at 9994, R. 206-208.

ARGUMENT

POINT I

The business conducted by respondent has a close, intimate and substantial relation to trade, traffic and commerce among the several states; and a labor dispute in respondent's business may lead or tend to lead to an obstruction of, or to the free flow of such commerce.

It is not the kind of business, nor the manner of its operation, which determines whether such business has a close or substantial relation to interstate commerce. The determining factor is the effect, if any, which a business may have upon commerce. Put another way, it is the effect upon interstate commerce, not the source of the injury, which is the criterion. *Consolidated Edison Co. v. Labor Board*, 305 U. S. 197. An analysis of respondent's business, in the light of this rule, demonstrates that

the obtaining of reading matter and advertising, the purchase of newsprint and other supplies, makes interstate commerce indispensable. Conversely, if respondent's business were to suffer a labor dispute, the free flow of such commerce might be obstructed.

The respondent's position appears to be that interstate commerce is not involved, principally because its business is not an essential part of a "flow" of such commerce, because the out-of-state circulation of the Citizen-News is infinitesimal, and finally because editorial employees, who are involved in this case, are too remote from any interstate activity to have any direct relation with it. The first argument is based upon the fact that Associated and United Press news, even if originating out of the state, "comes to rest" in the respective California offices of those services, and then is sent out from those offices to the respondent, and upon the reverse of this fact as well (9995, R. 2, 9, 132-133, 134-135).

Such an essential "flow" of commerce as would exist, were Associated and United Press news to be transmitted to respondent from one or more points outside the state of California, is not necessary for federal concern over respondent's conduct of its business.

"The Congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious actions springing from other sources." *Labor Board v. Jones Laughlin Steel Corp.*, 301 U. S. 1.

This rule was followed in *Labor Board v. Fainblatt*, 306 U. S. 601, 607, where the evidence disclosed that the

respondent, engaged in processing clothes in New Jersey, received cloth from a dress firm in New York. After making the garments, they were delivered in New Jersey to an agent of the dress firm, who in turn shipped them to New York. Fainblatt had nothing to do with the interstate movement of either the goods or the finished dresses. The Supreme Court held that even though an employer is not himself engaged in interstate commerce, he may be subject to the National Labor Relations Act.

The question is not, does the respondent engage in interstate commerce when it receives news from the California offices of the Associated or United Press, even if such news had reached those offices from outside the state. The question is, rather, what effect would a labor dispute in respondent's business have upon commerce? The transmission of news among the states is commerce within the meaning of the Constitution. *Associated Press v. N.L.R.B.*, 301 U. S. 103. There is no distinction between the transmission of news (*Associated Press* case, *supra*) and the receipt of such news by an individual newspaper. *N.L.R.B. v. A. S. Abell Co.*, 97 Fed. 951.

It seems logical, therefore, to conclude that a stoppage of work at respondent's plant, whether in the mechanical or editorial department, would interrupt the receipt of news sent out through interstate channels. It can make no difference in the effect of such a stoppage, if the news goes through the hands of a third party within the state.

This distinction which respondent advances, ignores the existence of an actual "flow" of commerce. The distinction also ignores the fact that the respondent's newspaper is a "feeder" for the Associated Press, which has the right to take any news item from respondent's paper and send it to any part of the United States or to any

part of the world. Therefore, the Citizen-News is a direct vehicle for the "flow" of news. Newsprint comes by water and truck from Canada directly to respondent. Syndicated articles and comic strips come directly by mail or express (9994, R. 193) from New York; Philadelphia; and Des Moines, Iowa. National advertising comes by mail from respondent's national advertising agent in Chicago (9994, R. 208, 210-211), and this agent's commission checks are mailed to Chicago (R. 213, *ibid*).

A similar situation existed in *N.L.R.B. v. A. S. Abell Co.*, 97 Fed. 951 (4th Circuit), and in *N.L.R.B. v. W. R. Hearst, et al.*, 102 Fed. 658 (9th Circuit), where it was held that such activities constitute interstate commerce.

Is there any logic in the second distinction, namely, that editorial employees are too remote from interstate commerce to affect it in any way? The argument was advanced in *Associated Press v. N.L.R.B.*, 301 U. S. 103.

In discussing editorial employees in this connection, Mr. Justice Roberts stated:

"We think, however, it is obvious that strikes or labor disturbances amongst this class of employees would have as direct an effect upon the activities of the petitioner as similar disturbances amongst those who operate the teletype machines or as a strike amongst the employees of telegraph lines over which petitioner's messages travel."

Finally, there is respondent's contention that its business is local, and that the number of copies of the Citizen-News which circulate outside the State of California is negligible. This fact standing alone might be conclusive for such argument. Coupled, however, with respondent's direct activities in interstate commerce, the argument becomes untenable. It was so found in *The Press Co. Inc.*

v. *N.L.R.B.*, 118 Fed. 937 (U.S.C.A., Dist. of Col.), certiorari denied 313 U. S. 595; and in *Fleming v. Lowell Sun Co.*, 36 Fed. Supp. 320 (D. C. Mass.) (rev. on other grounds, 120 Fed. (2d) 213), aff'd 314 U. S., where the Court held:

“* * * However, the percent or number of newspapers of the respondent that crossed state lines is not controlling on the question of whether or not the respondent is engaged in commerce between the states. It is common knowledge that the instrumentalities of interstate commerce are used and affected by every newspaper in gathering and publishing news and preparing the newspaper for circulation in and out of the state in which it is published.”

In *Santa Cruz Packing Co. v. N.L.R.B.*, 91 Fed. (2d) 790 (C. C. A. 9), affd. 303 U. S. 453, 464, 467, it was held that in view of the interstate commerce actually carried on by the petitioner, the fact that all its grown fruits were sold within the State of California, was of no consequence in determining that the petitioner was engaged in interstate commerce.

“* * * The existence of a continuous flow of commerce through the State may indeed readily show the intimate relation of particular transactions to that commerce.”

“* * * (p. 467) There is thus no point in the instant case in a demand for the drawing of a mathematical line. And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases.”

POINT II

The Board's orders directing the respondent to cease and desist from discouraging membership in the Los Angeles Newspaper Guild or from interfering in any manner with its employees in the exercise of their right to self-organization does not deprive it of freedom of speech or freedom of press under Amendment 1 to the Constitution of the United States.

The business of publishing a newspaper is not immune from regulation simply because it is the "press". As was held by Mr. Justice Roberts in *Associated Press v. N.L.R.B.*, 301 U. S. 103, 105:

"The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others * * *."

It is strange indeed that immediately any attempt is made by legislation to regulate business, if such regulation affects newspapers, the cry of "freedom of the press" is raised with crocodile tears. The insincerity of this cry, which takes the form of complaining that the proposed regulation destroys the liberty of the publishers to publish the news impartially, is manifested by the case of *Fleming v. Lowell Sun Co.*, 36 Fed. Supp. 320 (D. C. Mass.), reversed on other grounds 120 Fed. 2d 213, affd. 314 U. S. . . . In that case the cry of freedom of the press was raised against regulation by the Minimum Wage Laws. The Court took no heed of that contention. Extension of union organization into the newspaper industry has resulted in none of the horrible effects upon

editorial policy nor upon news material itself, which publishers have invariably and consistently bemoaned. Their opposition to regulation was fathered in past cases and is fathered in this case, by purely selfish motives.

How news can be distorted to suit an employee's bias, or in what manner an employee might be caused to distort a publisher's editorial policies, simply because he is protected by the Wages and Hours Act, is something the imagination fails to grasp. If bias exists on the part of any employee of a newspaper publisher, or rather if such employee has a bias contrary to that of his employer, the application of the Wages and Hours Act or the application of the National Labor Relations Act will not affect it one way or the other.

In the instant case there is not a shred of evidence in either record pointing to bias, distortion of news or opposition to editorial policies on the part of any employee in the editorial department, including the discharged employee, Lugoff. Nor is there any claim that because of union affiliation, any employee would be likely to show bias in the future.

This aspect of newspaper regulation was dealt with exhaustively by Mr. Justice Roberts in the *Associated Press* case (*supra*), when he said (p. 106):

“We think the condition not only has no relevancy to the circumstances of the instant case, but is an unsound generalization * * *.”

(p. 107)

“* * * The regulation here in question has no relation whatever to the impartial distribution of news. The order of the Board in no way circumscribes the full freedom and liberty of the peti-

tioner to publish the news as it desires it published, or to enforce policies of its own choosing with respect to the re-writing of news it publishes, and the petitioner is free at any time to discharge Watson or any editorial employee who fails to comply with the policies it may adopt."

See also:

Near v. Minnesota, 283 U. S. 697, 713.

The real opposition in this case, as in other cases where the cry of freedom of the press is raised, stems from something more than feigned fear of the wolf. It stems from simple opposition (which is in itself one of our basic rights) to governmental regulation of business in any form, shape or manner, and from a desire to continue exploitation and interference with the employees' rights of organization. Of course, to oppose the Board's order in the instant case on such basis would avail respondent nothing; consequently other real or imaginary weapons must be used. Aside from an attack upon the absence of substantial evidence to support the Board's orders, which will be discussed later, there is no other real weapon with which to oppose the jurisdiction of the National Labor Relations Board. The *Associated Press* case (*supra*) once and for all has disposed of the false cry that freedom of the press is in danger. There is no justification for the insincere use of one of our most precious rights as a battle cry against enlightened legislation. The respondent's plea must be recognized as a camouflaged device to seek immunity for a business enterprise, and not as a protection for a vehicle of opinion.

POINT III

No contravention of the due process clause of the Constitution is involved in that part of the Board's order which requires the respondent to post notices stating that it will cease and desist from the violations found by the Board to have occurred.

Respondent objects to such part of the Board's order in case 9994 as directs the posting of a notice stating that respondent will "cease and desist in the manner aforesaid" (R. 148, 157).

It objects also to the direction for posting in case 9995 which requires it to state "that the respondent will not engage in the conduct from which it is ordered to cease and desist * * *" (R. 118, 127).

Both objections are based upon the contention that such requirements for posting, if enforced, would compel the respondent to admit or at least imply that it has heretofore engaged in an unfair labor practice, which would be a confession of violation of law. This, it is claimed, the Board has no power to do, as it is in contravention of Amendment 5 to the Constitution.

It is to be noted that the language in case 9995 requiring posting, differs from the language in case 9994. Prior to *N.L.R.B. v. Express Publishing Co.*, 312 U. S. 426, the Board's orders required posted notices to announce that respondents would "cease and desist" from violations as found. In that case, however, an attack similar to that in the instant case, was made upon such requirement, on the ground that it required the respondent to confess violation by such announcement.

The force of such argument was recognized, and the Board consented to amend that part of the order to provide that the posted notice state that the respondent:

“will not engage in the conduct from which it is ordered to cease and desist as aforesaid.”

This is exactly the same language as used in the posting order in case 9995 (R. 118), and which was approved by the Court in the *Express Publishing* case (*supra*).

Unquestionably the Board will consent to a similar modification in case 9994. Therefore it remains only to discuss the Board's power to require the posting of notices. Upon that point, Mr. Justice Roberts held *N.L.R.B. v. Express Pub. Co.*, 312 U. S. 426, 438:

“We have often held that the posting of notices advising the employees of the Board's order and announcing the readiness of the employer to obey it, is within the authority conferred on the Board by sec. 10 (c) of the Act ‘to take such affirmative action * * * as will effectuate the policies’ of the Act. See *N.L.R.B. v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 268; *H. J. Heinz Co. v. N.L.R.B.* (*supra*)” (311 U. S. 514).

There is thus no valid basis for respondent's argument that the requirement for posting notices in the form required in case 9995, violates any Constitutional rights of the respondent.

POINT IV

There is substantial evidence in both records to support the Board's findings that the respondent interfered with its employees' right to self-organization for the purpose of collective bargaining; discouraged membership in the Los Angeles Newspaper Guild; and discharged Leonard Lugoff because of his union membership and activity.

Where findings of fact are supported by substantial evidence, this Court is bound by such findings. *Appalachian Electric Power Co. v. Labor Board* (U.S.C.C.A. 4th Cir.), 93 F. (2d) 985. "Substantial evidence" is evidence furnishing a substantial basis of fact from which the fact in issue can be reasonably inferred. *Washington, Virginia and Maryland Coach Co. v. N.L.R.B.*, 301 U. S. 142.

An examination of the records compels the conclusion that, in each case, substantial evidence justifies the Board's findings and order based thereon.

Case 9994

In this case the Board found that the respondent had violated section 7 of the N.L.R.A. by interfering with, restraining and coercing its employees in the exercise of their rights to bargain collectively and to join labor organizations of their own choosing (R. 135).

The record discloses a consistent attitude of opposition on the part of Harlan G. Palmer, president of the respondent corporation, to any kind of concerted activity on the part of respondent's employees, directed toward improvement of working conditions. Prior to formation

of the Los Angeles Newspaper Guild, eight editorial employees attempted to negotiate working conditions and salaries with Palmer (R. 234). The evidence discloses that instead of one conference for eight, there occurred eight individual discussions with Palmer, each a pleasant discussion, dominated by Palmer who avoided the subject of salaries (R. 234, 263). The separate interviews came about as follows, to quote the uncontradicted testimony of Elizabeth Yeaman. Originally in June, 1936, a joint petition of those eight employees had been sent in to Palmer. His response was a bulletin board notice inviting every employee, if he wished, to discuss salary readjustments with him (R. 262-263). The eight individual conferences followed, which touched apparently on every conceivable subject but salaries (R. 264).

In July, 1936, when some routine raises came through, Young, respondent's business manager, told Roger Johnson, one of the eight, that Palmer "was averse to taking action under suggestions from pressure groups" (R. 243, 265). Young was not called to testify; nor did Palmer, who testified at length, deny it.

Also about July, 1936, "Office Gossip" a mimeographed house organ appeared with a call to all employees to register individual complaints with department heads. It also contained an invitation to dissatisfied employees to seek other employment (R. 265).

In September, 1936, the Guild was organized. Johnson became its first president (R. 237). A month later a unit of the Guild was organized among the respondent's editorial employees with the knowledge of Palmer and other supervisory employees (R. 237-238).

From then on, there occurred a series of events, each perhaps in itself not sufficient to establish Palmer's resent-

ment and opposition to the employees' collective activity, but which, together, and in the light of his admitted resistance to "pressure groups", form a pattern of active hostility to the Guild.

Johnson testified that at first flattery, then subtle bribery was used upon him. He delivered a radio talk, at the suggestion of his managing editor, Swisher, in aid of Palmer's political campaign (R. 237-238). At Swisher's suggestion Johnson was introduced as president of the Los Angeles Newspaper Guild (R. 273). Early in 1937 Palmer's sister suggested to Johnson that the Guild might not be necessary on the Citizen-News (R. 245), and Johnson disputed it (R. 246). About the same time, Wynn, assistant business manager, questioned Johnson about Guild plans for a contract and suggested that the union was paying "too much attention to the economic phases" (R. 246, 398). Later Swisher questioned the Guild's affiliation with the C.I.O. (R. 247). Then Young, the business manager, questioned Johnson about Guild organization of the business department (R. 247). Subtle bribery was tried by Young, when he intimated that if Johnson would quit the Guild, he might be promoted to an executive position (R. 248). In July, Brandon, head of the display advertising department, questioned the appropriateness of a union for "temperamental" newspaper people (R. 249).

In the spring or summer of 1937, after the editorial department Guild unit had been organized, a meeting was held between Palmer and employees of the department (not as a Guild unit) (R. 249). At that meeting Palmer attempted to destroy the unit by pressing for a *department* contract (R. 272-274, 398-400). He was seeking separate agreements with each department (R. 249-252).

In October, 1937, an organizational drive began in Brandon's department. He tried to be admitted to the Guild, but was rejected, as he was a department head (R. 252-253). That same month, the display advertising department employees were ordered to work Saturday (R. 255), although no advertising could be sold on that day (R. 255). Young admitted in effect to Johnson, that Brandon had ordered the Saturday work through spite (R. 255-256) and the uncontradicted testimony of Schlichter corroborates this (R. 375). The order was rescinded after a few weeks.

None of the supervisory employees mentioned so far in this narrative, was produced as a witness by respondent. These events stand uncontradicted.

At least one of the eight editorial employees, Elizabeth Yeaman, felt that the statement and warning in "Office Gossip" was:

"* * * the result of eight of us in our naive wish to earn some more money having, perhaps, tread upon his toes in presenting a joint petition for some more salary" (R. 271).

A better example of coercion is difficult to imagine.

Then there is the testimony of Karl von Vetler Schlichter, an employee of the business department, under Young and Brandon (R. 276-282). His testimony was uncontradicted.

Some time after June, 1937, after Schlichter had joined the Guild, the manager of the classified advertising department said to him that he (the manager) "thought that the editorial workers were making a serious mistake to attempt to get higher wages * * * and that * * * the judge (meaning Palmer) will never sign a union con-

tract" (R. 278). Brandon, at meetings of the display salesmen, would often devote the meetings to denunciations of unions and of the Guild in particular (R. 279-281), and outside of meetings attacked the Guild (R. 282). At a later time Young told Schlichter that it would be easy to break the union by giving other employees higher wages than the editorial employees were getting, thus showing that the union was unnecessary in order to get higher wages (R. 377).

Helen Brichoux Kavalosky testified as follows: after the Guild had voted to admit members of non-editorial departments (R. 382), attempts were made by Young to force his department into a contract (R. 380-385). When Kavalosky accused Young of trying to form a company union (R. 384), he countered with an accusation that she was "getting outside advice" (R. 384). Young's efforts, however, were unsuccessful (R. 384).

In May, 1938, a strike was called by the Guild against the Citizen-News in protest over discharges. Kavalosky was on the picket-line. During the strike, Brandon saw her in a restaurant, and shouted at her:

"Helen, you had better get out of here because I want to sit down and eat lunch. I won't eat with a striker" (R. 385-386).

Helen told of the efforts of Zuma Palmer, daughter of Palmer, to discourage her from joining the Guild "in view of all that the Judge had done for all of the editorial department and for me, that she thought it was very ungrateful of anyone to join the Guild" (R. 387-388).

Not one of the incidents in this entire narrative was contradicted or questioned by the respondent. It produced only one witness, Palmer, who contented himself with

testifying to the paper's financial condition in order to justify certain discharges, with which we are not here concerned.

The respondent's position is that at the editorial employees' meeting with Palmer, he expressed disappointment that he could not reach an agreement with the Guild (R. 89). The record fails to support this, but does show that Palmer upbraided the employees at the meeting by demanding:

"What is the matter with you people? Don't you know what you want? Can't you make up your own minds? Do you prefer to have somebody in Washington or New York or some place dictate to you?" (R. 234)

The foregoing evidence, substantial and uncontradicted, permits, nay compels, the conclusion that the respondent, through Palmer and his supervisory employees, missed no opportunity or occasion to deride and ridicule the Guild, to attempt to undermine its usefulness, to destroy its existence. The Board's findings to this effect are, therefore, completely justified.

Case 9995

In this case the Board found that the respondent had discriminated in regard to the hire and tenure of employment of Leonard Lugoff, thus discouraging membership in the Guild (p. 111), and had violated Sec. 7 of the N.L.R.A. by interfering with, restraining and coercing its employees in the exercise of their rights to bargain collectively and to join labor organizations of their own choosing (R. 112).

Leonard Lugoff; his discharge and reinstatement in August, 1938

Lugoff was employed in the classified advertising department as an outside salesman. In October, 1937, he joined the Guild. In May, 1938, a strike occurred (R. 187), but Lugoff did not go out with his fellow union members. As a result he was dropped from membership (R. 187). In August, while the strike was still on (R. 188), he took a two week vacation (R. 187). Upon his return he was discharged (R. 187), but reinstated by Palmer on probation till January 1, 1939 (R. 191-193). The basis for this probationary reinstatement is important, as it bears directly upon Lugoff's final discharge on March 30, 1940.

Palmer testified that the reinstatement was based upon Lugoff's plea that, inasmuch as five union members were being reinstated under a strike settlement agreement pending a Labor Board decision, he should be accorded no worse treatment, as he had not joined the strikers (R. 142-145, 580-581). Young was present at this conversation (R. 189, 555-6, 579, 581), and corroborated Palmer (R. 555-6). Then, according to Palmer, he reinstated Lugoff "on probation till January 1, 1939" (R. 191-193, 581), and gave him a letter to that effect (Bd. ex. 16, R. 193). Upon receipt of the Labor Board's decision (case 9994) on March 28, 1940 (R. 577) holding that the five union members had not been discharged in violation of section 8 of the Act, two of the five (three having resigned previously) were discharged, as well as Lugoff on March 30, 1940 (R. 147-148). On the other hand, Young stated that the *only* reason for Lugoff's final discharge was his "lack of production" and "nothing else" (R. 347).

Lugoff's story is entirely different, of course. He says that in his August, 1938, reinstatement was based upon his plea that prior to his vacation he had incurred a \$300 debt, upon the assurance of Tobin, his superior, that his job was safe, despite his failure to earn his guaranty (R. 188), and that his discharge was unfair (R. 189-190). Although Tobin denied that he had given Lugoff any assurance about his job, he admitted the conversation about the intended loan (R. 427); and did not deny that he made no reply when Lugoff accused him of first promising him that his job was secure and then firing him (R. 275).

At this point it should be noted that none of the five strikers, reinstated pursuant to the settlement agreement in August, 1938, was placed on probation, as was Lugoff. Only *he* received such a letter. Palmer himself admitted that he had not told Lugoff that he would be reinstated under the terms of the settlement agreement (R. 144).

These facts, plus Palmer's admissions, afforded the Board substantial evidence that Lugoff's reinstatement had nothing whatsoever to do with the strike settlement.

Lugoff's final discharge on March 30, 1940

Palmer insists that he discharged Lugoff only because the Board's order (case 9994) relieved him of the terms of the strike settlement agreement (R. 145). The evidence, as we have seen, does not support this. Young, however, places it on the ground of "unproductivity" and "nothing else" (R. 347). Is Young's story true, or is there still another reason—union activity?

Lugoff rejoined the Guild in February, 1939 (R. 195). Meanwhile his probationary period (Jan. 1, 1939) had come and gone, with no word from Palmer, Young or

Tobin (R. 194). He had every right to assume then that he had successfully passed the probationary period. Apparently he was right; as he kept his job for another year and a half.

Lugoff's complete record of earnings was put into evidence (pp. 174-6) together with a record of earnings for the 4 weeks immediately preceding March 30, 1940, of all the salesmen in his department (R. 205-8). These tables show that between May and August, 1938 (the months during the strike) Lugoff's earnings dropped sharply (R. 174). Between September and December, 1938, the probationary period, they rose substantially although not quite to the pre-strike level (R. 175). This was due in part at least, it can be fairly assumed, to a failure to regain advertisers lost through the strike (R. 167). Between January and June, 1939, his earnings remained on a par with those of his probationary period (R. 175-6). In July, 1939, through the efforts of Lugoff, all classified salesmen received a weekly guaranteed salary of \$24 (R. 176, 199). From then until his discharge, March 30, 1940, Lugoff's earnings were just a shade under his previous earnings, except for the month of March itself when they rose sharply just before his discharge (R. 177). This appears by comparing the figures on page 177 with the figures on pages 205-208, which show that the figures on page 177 for the 4 weeks in March are incorrect.

Lugoff testified that during the entire period between July, 1939, to March, 1940, his earnings equalled or bettered his \$24 guaranty only a few times (R. 199-200) but that he never was spoken to about it (R. 200, 213). He also testified, and the records bear him out (R. 201, 205-208) that in March, 1940, he was the second highest man in the department. *None of the four salesmen below him in productivity was discharged.*

Lugoff's retention beyond his probationary period shows that his productivity was satisfactory; as does the fact that he was able to persuade Tobin to establish a \$24 minimum salary at a time when he was not earning that much. Above all, his March, 1940, earnings which were substantially higher than the preceding months' earnings, cast grave doubt on respondent's claim that he was discharged for failure to produce.

There is evidence by Tobin, that Lugoff was lazy (R. 430-460) and did not follow up leads given to him between August, 1939, and March, 1940. Yet, his earnings after August, 1939, were no lower than before.

Beginning with his re-entry into the Guild, Lugoff became very active seeking members and circulating petitions (R. 195). The only other Guild member in his department was Helen Brichoux (R. 195). In August, 1939, Frank Gilman, credit manager, warned Lugoff to cease his Guild activity or he would be out of a job (R. 235), and that the next Presidential election would result in the abolition of the N.L.R.B. (R. 235). Gilman was not called to deny this, nor was George Palmer, in whose hearing it was said (R. 237). About March 15, 1940, two weeks before his discharge, Lugoff circulated a union petition (R. 226) among all the employees of the classified department, and in the presence of Tobin (R. 228).

The respondent's attitude toward the Guild ever since the strike, is indicated clearly by Palmer's statements, that the Guild and the Board were out to destroy the Citizen-Union (R. 164-5), and that he (Palmer) would not post notices in accordance with the Board's order "until the Court orders us to do so."

Another incident, indicative of respondent's attitude toward the Guild, was a statement by George Palmer, son

of one of the owners, that it was a fact that the management would close the plant if the Guild did not act "reasonable" (R. 218-219). This was not denied.

In the face of all this very definite evidence, the Board found that Lugoff's discharge was discriminatory and due to his union activity. It is supported further by the failure of Tobin to follow his usual routine when he had decided to discharge some one (R. 236) and by the fact that Palmer himself—not Tobin as would be customary—discharged Lugoff (R. 236). His discharge notice was mailed 8 P. M. Saturday and received that night at 10 P. M. by special delivery, a fact which points to a sudden decision suddenly acted upon.

The Unfair Labor Practices

In addition to the incidents already discussed in relation to Lugoff, the uncontradicted testimony supports the Board's finding of unfair labor practices. The publisher was merely acting in accordance with his avowed policy of defiance of the Board and resulting defiance of the Wagner Act itself.

According to Patricia Killoran, a Guild member who participated in the strike, Young denounced her and "all of you" for "all the things that you have done" and coupled it with an unmistakable reference to the Guild (R. 356). On another occasion, Killoran circulated a petition in the composing room, which was designed to make peace between Palmer and the Typographical Union through the good offices of the Guild.¹ All she got for her pains

¹ Despite Palmer's profession of sympathy for labor unions (R. 165), it extended only to a point where it did not affect his business (R. 165). The typographers in his plant were unorganized. Killoran hoped to achieve Palmer's recognition of the Typographical Union so that the respondent would not lose one of its large printing contracts (R. 357).

was a rebuke from Swisher that she was "always trying to stir up trouble" (R. 358-9).

The record contains additional unrefuted testimony of many other active indications of anti-Guild feeling and expressions on the part of supervisory employees, such as the denial of "by-lines" after the strike, to those employees who had previously rated this honor (R. 420). This was done, said Swisher, because he felt that advertisers would be offended and alarmed at seeing stories signed by Guild members who had participated in the strike (R. 421). This excuse is flimsy indeed. It is felt that those incidents already listed are more than sufficient to justify a finding that the respondent engaged in unfair labor practices.

It is to be remembered, of course, that whether, upon all the evidence, this Court would have come to different conclusions does not in itself justify a reversal of the Board's orders. So long as there is substantial evidence to support the Board's orders, this Court is bound by the findings of fact. *Appalachian Electric Power Co. v. Labor Board*, 93 F. (2d) 985 (U.S.C.C.A., 4 Circ.).

However, in this case, the Court may not be concerned over such considerations. It is clear that this case presents a picture of flagrant violations and open defiance of the law. Court action is indicated to support the remedial decisions of the Board.

Conclusion

For the foregoing reasons, the Board's petitions for enforcement of its orders in both cases should be granted, and the respondent should be directed to cease and desist from unfair labor practices, reinstate Leonard Lugoff

with back pay, and post notices that it will refrain from engaging in the activities from which it has been ordered to cease and desist.

Respectfully submitted,

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on the Brief.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

THE CITIZEN NEWS COMPANY, RESPONDENT.

ON PETITION FOR ENFORCEMENT OF ORDERS OF THE
NATIONAL LABOR RELATIONS BOARD

**BRIEF FOR INTERVENORS, LOS ANGELES
NEWSPAPER GUILD AND LEONARD LUGOFF**

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FILED

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IN THE
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Nos. 9994 and 9995

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

THE CITIZEN NEWS COMPANY,

Respondent.

ON PETITION FOR ENFORCEMENT OF ORDERS OF THE
NATIONAL LABOR RELATIONS BOARD

Order Permitting Intervention

Pursuant to order of this Court, the intervenors have been permitted as interested parties, to file a brief in support of the petition of the National Labor Relations Board for enforcement of its orders against the respondent.

Summary of the Cases

Two petitions of the National Labor Relations Board are before this Court for enforcement.

The first (9994) seeks enforcement of the Board's order directing the respondent to cease and desist from "interfering with, restraining, or coercing its employees in the exercise of the right * * * to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing * * *" pursuant to Section 7 of the National Labor Relations Act (R. 148).

The second (9995) seeks enforcement of an order directing the respondent to cease and desist, as above stated, and from discouraging membership in the Los Angeles Newspaper Guild, from discriminating in regard to hire and tenure of employment of any of its employees, and to reinstate Leonard Lugoff, whom the Board found had been discharged because of union activity (R. 117).

The respondent, a California corporation, publishes a daily newspaper in Hollywood known as the Citizen-News, as well as other publications, and operates a job printing service (9994, R. 170).

Questions Presented

Upon these petitions for enforcement, four questions are presented. They are:

1. Whether the business conducted by the respondent bears a close and intimate relation to interstate commerce and whether an unfair labor practice of the respondent affects such commerce.

2. Whether the Board's orders, which are sought to be enforced (9994, R. 146-150; 9995, R. 115-120) would deprive respondent of freedom of speech and press under Amendment I to the Constitution of the United States.

3. Whether such orders which require the respondent to post notices stating that it will cease and desist as

hereinabove indicated, violate the due process clause of Amendment 5 to the Constitution of the United States.

4. Whether the Board's orders are based upon substantial evidence.

Conceded Facts

The Los Angeles Newspaper Guild had been designated as the representative of the editorial employees of the Citizen-Union for the purpose of collective bargaining with respondent (9994, R. 6, 17).

Respondent's publications are circulated entirely within the State of California, except that the Citizen-News, whose daily circulation is in excess of 26,000, sends about 125 daily copies outside the State (9994, R. 170-172; 9995, R. 2-3, 9).

Respondent imports from outside the state 350 tons of newsprint a week (9994, R. 216; 9995, R. 3, 9, 134). The cost of this newsprint constitutes 20% of the total expenses of all of the respondent's publications (9994, R. 219; 9995, R. 3, 9).

The Associated Press and the United Press service the Citizen-News. Both services together supply out-of-state news to the extent of 21% of the paper's total reading matter, although such out-of-state news is received through the California offices of both news services (9994, R. 173-174, 181, 183-184, 188-190; 9995 R. 2, 9).

Eleven feature syndicates supply about 17% of the paper's total reading matter, all of which comes from outside the state (9994, R. 191-193, 228; 9995, R. 2, 9).

With the qualification that Associated and United Press news comes through the California offices of these agencies, the Citizen-News contains daily about 38% of

out-of-state news. This material is received by wire, teletype, wireless and mail (9994, R. 173-174, 181, 183-184, 188-190; 9995, R. 2, 9).

The Associated Press has the privilege of using any other news appearing in respondent's paper, and of transmitting such news through its California office to out-of-state points (9994, R. 176, 180-181; 9995, R. 2, 9).

About 10% of respondent's advertising revenue, which represents more than 5% of its total revenue, comes from advertising originating outside the State of California (9994, R. 197; 9995, R. 2, 9). A list of advertisers is contained at 9994, R. 206-208.

ARGUMENT

POINT I

The business conducted by respondent has a close, intimate and substantial relation to trade, traffic and commerce among the several states; and a labor dispute in respondent's business may lead or tend to lead to an obstruction of, or to the free flow of such commerce.

It is not the kind of business, nor the manner of its operation, which determines whether such business has a close or substantial relation to interstate commerce. The determining factor is the effect, if any, which a business may have upon commerce. Put another way, it is the effect upon interstate commerce, not the source of the injury, which is the criterion. *Consolidated Edison Co. v. Labor Board*, 305 U. S. 197. An analysis of respondent's business, in the light of this rule, demonstrates that

the obtaining of reading matter and advertising, the purchase of newsprint and other supplies, makes interstate commerce indispensable. Conversely, if respondent's business were to suffer a labor dispute, the free flow of such commerce might be obstructed.

The respondent's position appears to be that interstate commerce is not involved, principally because its business is not an essential part of a "flow" of such commerce, because the out-of-state circulation of the Citizen-News is infinitesimal, and finally because editorial employees, who are involved in this case, are too remote from any interstate activity to have any direct relation with it. The first argument is based upon the fact that Associated and United Press news, even if originating out of the state, "comes to rest" in the respective California offices of those services, and then is sent out from those offices to the respondent, and upon the reverse of this fact as well (2005, R. 2, 9, 132-133, 134-135).

Such an essential "flow" of commerce as would exist, were Associated and United Press news to be transmitted to respondent from one or more points outside the state of California, is not necessary for federal concern over respondent's conduct of its business.

"The Congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious actions springing from other sources." *Labor Board v. Jones Laughlin Steel Corp.*, 301 U. S. 1.

This rule was followed in *Labor Board v. Fainblatt*, 306 U. S. 601, 607, where the evidence disclosed that the

respondent, engaged in processing clothes in New Jersey, received cloth from a dress firm in New York. After making the garments, they were delivered in New Jersey to an agent of the dress firm, who in turn shipped them to New York. Fainblatt had nothing to do with the interstate movement of either the goods or the finished dresses. The Supreme Court held that even though an employer is not himself engaged in interstate commerce, he may be subject to the National Labor Relations Act.

The question is not, does the respondent engage in interstate commerce when it receives news from the California offices of the Associated or United Press, even if such news had reached those offices from outside the state. The question is, rather, what effect would a labor dispute in respondent's business have upon commerce? The transmission of news among the states is commerce within the meaning of the Constitution. *Associated Press v. N.L.R.B.*, 301 U. S. 103. There is no distinction between the transmission of news (*Associated Press* case, *supra*) and the receipt of such news by an individual newspaper. *N.L.R.B. v. A. S. Abell Co.*, 97 Fed. 951.

It seems logical, therefore, to conclude that a stoppage of work at respondent's plant, whether in the mechanical or editorial department, would interrupt the receipt of news sent out through interstate channels. It can make no difference in the effect of such a stoppage, if the news goes through the hands of a third party within the state.

This distinction which respondent advances, ignores the existence of an actual "flow" of commerce. The distinction also ignores the fact that the respondent's newspaper is a "feeder" for the Associated Press, which has the right to take any news item from respondent's paper and send it to any part of the United States or to any

part of the world. Therefore, the Citizen-News is a direct vehicle for the "flow" of news. Newsprint comes by water and truck from Canada directly to respondent. Syndicated articles and comic strips come directly by mail or express (9994, R. 193) from New York; Philadelphia; and Des Moines, Iowa. National advertising comes by mail from respondent's national advertising agent in Chicago (9994, R. 208, 210-211), and this agent's commission checks are mailed to Chicago (R. 213, *ibid*).

A similar situation existed in *N.L.R.B. v. A. S. Abell Co.*, 97 Fed. 951 (4th Circuit), and in *N.L.R.B. v. W. R. Hearst, et al.*, 102 Fed. 658 (9th Circuit), where it was held that such activities constitute interstate commerce.

Is there any logic in the second distinction, namely, that editorial employees are too remote from interstate commerce to affect it in any way? The argument was advanced in *Associated Press v. N.L.R.B.*, 301 U. S. 103.

In discussing editorial employees in this connection, Mr. Justice Roberts stated:

"We think, however, it is obvious that strikes or labor disturbances amongst this class of employees would have as direct an effect upon the activities of the petitioner as similar disturbances amongst those who operate the teletype machines or as a strike amongst the employees of telegraph lines over which petitioner's messages travel."

Finally, there is respondent's contention that its business is local, and that the number of copies of the Citizen-News which circulate outside the State of California is negligible. This fact standing alone might be conclusive for such argument. Coupled, however, with respondent's direct activities in interstate commerce, the argument becomes untenable. It was so found in *The Press Co. Inc.*

v. *N.L.R.B.*, 118 Fed. 937 (U.S.C.A., Dist. of Col.), certiorari denied 313 U. S. 595; and in *Fleming v. Lowell Sun Co.*, 36 Fed. Supp. 320 (D. C. Mass.) (rev. on other grounds, 120 Fed. (2d) 213), aff'd 314 U. S., where the Court held:

“* * * However, the percent or number of newspapers of the respondent that crossed state lines is not controlling on the question of whether or not the respondent is engaged in commerce between the states. It is common knowledge that the instrumentalities of interstate commerce are used and affected by every newspaper in gathering and publishing news and preparing the newspaper for circulation in and out of the state in which it is published.”

In *Santa Cruz Packing Co. v. N.L.R.B.*, 91 Fed. (2d) 790 (C. C. A. 9), affd. 303 U. S. 453, 464, 467, it was held that in view of the interstate commerce actually carried on by the petitioner, the fact that all its grown fruits were sold within the State of California, was of no consequence in determining that the petitioner was engaged in interstate commerce.

“* * * The existence of a continuous flow of commerce through the State may indeed readily show the intimate relation of particular transactions to that commerce.”

“* * * (p. 467) There is thus no point in the instant case in a demand for the drawing of a mathematical line. And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases.”

POINT II

The Board's orders directing the respondent to cease and desist from discouraging membership in the Los Angeles Newspaper Guild or from interfering in any manner with its employees in the exercise of their right to self-organization does not deprive it of freedom of speech or freedom of press under Amendment 1 to the Constitution of the United States.

The business of publishing a newspaper is not immune from regulation simply because it is the "press". As was held by Mr. Justice Roberts in *Associated Press v. N.L.R.B.*, 301 U. S. 103, 105:

"The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others * * *."

It is strange indeed that immediately any attempt is made by legislation to regulate business, if such regulation affects newspapers, the cry of "freedom of the press" is raised with crocodile tears. The insincerity of this cry, which takes the form of complaining that the proposed regulation destroys the liberty of the publishers to publish the news impartially, is manifested by the case of *Fleming v. Lovell Sun Co.*, 36 Fed. Supp. 320 (D. C. Mass.), reversed on other grounds 120 Fed. 2d 213, aff'd. 314 U. S. . . In that case the cry of freedom of the press was raised against regulation by the Minimum Wage Laws. The Court took no heed of that contention. Extension of union organization into the newspaper industry has resulted in none of the horrible effects upon

editorial policy nor upon news material itself, which publishers have invariably and consistently bemoaned. Their opposition to regulation was fathered in past cases and is fathered in this case, by purely selfish motives.

How news can be distorted to suit an employee's bias, or in what manner an employee might be caused to distort a publisher's editorial policies, simply because he is protected by the Wages and Hours Act, is something the imagination fails to grasp. If bias exists on the part of any employee of a newspaper publisher, or rather if such employee has a bias contrary to that of his employer, the application of the Wages and Hours Act or the application of the National Labor Relations Act will not affect it one way or the other.

In the instant case there is not a shred of evidence in either record pointing to bias, distortion of news or opposition to editorial policies on the part of any employee in the editorial department, including the discharged employee, Lugoff. Nor is there any claim that because of union affiliation, any employee would be likely to show bias in the future.

This aspect of newspaper regulation was dealt with exhaustively by Mr. Justice Roberts in the *Associated Press* case (*supra*), when he said (p. 106):

“We think the condition not only has no relevancy to the circumstances of the instant case, but is an unsound generalization * * *.”

(p. 107)

“* * * The regulation here in question has no relation whatever to the impartial distribution of news. The order of the Board in no way circumscribes the full freedom and liberty of the peti-

tioner to publish the news as it desires it published, or to enforce policies of its own choosing with respect to the re-writing of news it publishes, and the petitioner is free at any time to discharge Watson or any editorial employee who fails to comply with the policies it may adopt."

See also:

Near v. Minnesota, 283 U. S. 697, 713.

The real opposition in this case, as in other cases where the cry of freedom of the press is raised, stems from something more than feigned fear of the wolf. It stems from simple opposition (which is in itself one of our basic rights) to governmental regulation of business in any form, shape or manner, and from a desire to continue exploitation and interference with the employees' rights of organization. Of course, to oppose the Board's order in the instant case on such basis would avail respondent nothing; consequently other real or imaginary weapons must be used. Aside from an attack upon the absence of substantial evidence to support the Board's orders, which will be discussed later, there is no other real weapon with which to oppose the jurisdiction of the National Labor Relations Board. The *Associated Press* case (*supra*) once and for all has disposed of the false cry that freedom of the press is in danger. There is no justification for the insincere use of one of our most precious rights as a battle cry against enlightened legislation. The respondent's plea must be recognized as a camouflaged device to seek immunity for a business enterprise, and not as a protection for a vehicle of opinion.

POINT III

No contravention of the due process clause of the Constitution is involved in that part of the Board's order which requires the respondent to post notices stating that it will cease and desist from the violations found by the Board to have occurred.

Respondent objects to such part of the Board's order in case 9994 as directs the posting of a notice stating that respondent will "cease and desist in the manner aforesaid" (R. 148, 157).

It objects also to the direction for posting in case 9995 which requires it to state "that the respondent will not engage in the conduct from which it is ordered to cease and desist * * *" (R. 118, 127).

Both objections are based upon the contention that such requirements for posting, if enforced, would compel the respondent to admit or at least imply that it has heretofore engaged in an unfair labor practice, which would be a confession of violation of law. This, it is claimed, the Board has no power to do, as it is in contravention of Amendment 5 to the Constitution.

It is to be noted that the language in case 9995 requiring posting, differs from the language in case 9994. Prior to *N.L.R.B. v. Express Publishing Co.*, 312 U. S. 426, the Board's orders required posted notices to announce that respondents would "cease and desist" from violations as found. In that case, however, an attack similar to that in the instant case, was made upon such requirement, on the ground that it required the respondent to confess violation by such announcement.

The force of such argument was recognized, and the Board consented to amend that part of the order to provide that the posted notice state that the respondent:

“will not engage in the conduct from which it is ordered to cease and desist as aforesaid.”

This is exactly the same language as used in the posting order in case 9995 (R. 118), and which was approved by the Court in the *Express Publishing* case (*supra*).

Unquestionably the Board will consent to a similar modification in case 9994. Therefore it remains only to discuss the Board's power to require the posting of notices. Upon that point, Mr. Justice Roberts held *N.L.R.B. v. Express Pub. Co.*, 312 U. S. 426, 438:

“We have often held that the posting of notices advising the employees of the Board's order and announcing the readiness of the employer to obey it, is within the authority conferred on the Board by sec. 10 (c) of the Act ‘to take such affirmative action * * * as will effectuate the policies’ of the Act. See *N.L.R.B. v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 268; *H. J. Heinz Co. v. N.L.R.B.* (*supra*)” (311 U. S. 514).

There is thus no valid basis for respondent's argument that the requirement for posting notices in the form required in case 9995, violates any Constitutional rights of the respondent.

POINT IV

There is substantial evidence in both records to support the Board's findings that the respondent interfered with its employees' right to self-organization for the purpose of collective bargaining; discouraged membership in the Los Angeles Newspaper Guild; and discharged Leonard Lugoff because of his union membership and activity.

Where findings of fact are supported by substantial evidence, this Court is bound by such findings. *Appalachian Electric Power Co. v. Labor Board* (U.S.C.C.A. 4th Cir.), 93 F. (2d) 985. "Substantial evidence" is evidence furnishing a substantial basis of fact from which the fact in issue can be reasonably inferred. *Washington, Virginia and Maryland Coach Co. v. N.L.R.B.*, 301 U. S. 142.

An examination of the records compels the conclusion that, in each case, substantial evidence justifies the Board's findings and order based thereon.

Case 9994

In this case the Board found that the respondent had violated section 7 of the N.L.R.A. by interfering with, restraining and coercing its employees in the exercise of their rights to bargain collectively and to join labor organizations of their own choosing (R. 135).

The record discloses a consistent attitude of opposition on the part of Harlan G. Palmer, president of the respondent corporation, to any kind of concerted activity on the part of respondent's employees, directed toward improvement of working conditions. Prior to formation

of the Los Angeles Newspaper Guild, eight editorial employees attempted to negotiate working conditions and salaries with Palmer (R. 234). The evidence discloses that instead of one conference for eight, there occurred eight individual discussions with Palmer, each a pleasant discussion, dominated by Palmer who avoided the subject of salaries (R. 234, 263). The separate interviews came about as follows, to quote the uncontradicted testimony of Elizabeth Yeaman. Originally in June, 1936, a joint petition of those eight employees had been sent in to Palmer. His response was a bulletin board notice inviting every employee, if he wished, to discuss salary readjustments with him (R. 262-263). The eight individual conferences followed, which touched apparently on every conceivable subject but salaries (R. 264).

In July, 1936, when some routine raises came through, Young, respondent's business manager, told Roger Johnson, one of the eight, that Palmer "was averse to taking action under suggestions from pressure groups" (R. 243, 265). Young was not called to testify; nor did Palmer, who testified at length, deny it.

Also about July, 1936, "Office Gossip" a mimeographed house organ appeared with a call to all employees to register individual complaints with department heads. It also contained an invitation to dissatisfied employees to seek other employment (R. 265).

In September, 1936, the Guild was organized. Johnson became its first president (R. 237). A month later a unit of the Guild was organized among the respondent's editorial employees with the knowledge of Palmer and other supervisory employees (R. 237-238).

From then on, there occurred a series of events, each perhaps in itself not sufficient to establish Palmer's resent-

ment and opposition to the employees' collective activity, but which, together, and in the light of his admitted resistance to "pressure groups", form a pattern of active hostility to the Guild.

Johnson testified that at first flattery, then subtle bribery was used upon him. He delivered a radio talk, at the suggestion of his managing editor, Swisher, in aid of Palmer's political campaign (R. 237-238). At Swisher's suggestion Johnson was introduced as president of the Los Angeles Newspaper Guild (R. 273). Early in 1937 Palmer's sister suggested to Johnson that the Guild might not be necessary on the Citizen-News (R. 245), and Johnson disputed it (R. 246). About the same time, Wynn, assistant business manager, questioned Johnson about Guild plans for a contract and suggested that the union was paying "too much attention to the economic phases" (R. 246, 398). Later Swisher questioned the Guild's affiliation with the C.I.O. (R. 247). Then Young, the business manager, questioned Johnson about Guild organization of the business department (R. 247). Subtle bribery was tried by Young, when he intimated that if Johnson would quit the Guild, he might be promoted to an executive position (R. 248). In July, Brandon, head of the display advertising department, questioned the appropriateness of a union for "temperamental" newspaper people (R. 249).

In the spring or summer of 1937, after the editorial department Guild unit had been organized, a meeting was held between Palmer and employees of the department (not as a Guild unit) (R. 249). At that meeting Palmer attempted to destroy the unit by pressing for a *department* contract (R. 272-274, 398-400). He was seeking separate agreements with each department (R. 249-252).

In October, 1937, an organizational drive began in Brandon's department. He tried to be admitted to the Guild, but was rejected, as he was a department head (R. 252-253). That same month, the display advertising department employees were ordered to work Saturday (R. 255), although no advertising could be sold on that day (R. 255). Young admitted in effect to Johnson, that Brandon had ordered the Saturday work through spite (R. 255-256) and the uncontradicted testimony of Schlichter corroborates this (R. 375). The order was rescinded after a few weeks.

None of the supervisory employees mentioned so far in this narrative, was produced as a witness by respondent. These events stand uncontradicted.

At least one of the eight editorial employees, Elizabeth Yeaman, felt that the statement and warning in "Office Gossip" was:

"* * * the result of eight of us in our naive wish to earn some more money having, perhaps, tread upon his toes in presenting a joint petition for some more salary" (R. 271).

A better example of coercion is difficult to imagine.

Then there is the testimony of Karl von Vetler Schlichter, an employee of the business department, under Young and Brandon (R. 276-282). His testimony was uncontradicted.

Some time after June, 1937, after Schlichter had joined the Guild, the manager of the classified advertising department said to him that he (the manager) "thought that the editorial workers were making a serious mistake to attempt to get higher wages * * * and that * * * the judge (meaning Palmer) will never sign a union con-

tract" (R. 278). Brandon, at meetings of the display salesmen, would often devote the meetings to denunciations of unions and of the Guild in particular (R. 279-281), and outside of meetings attacked the Guild (R. 282). At a later time Young told Schlichter that it would be easy to break the union by giving other employees higher wages than the editorial employees were getting, thus showing that the union was unnecessary in order to get higher wages (R. 377).

Helen Brichoux Kavalosky testified as follows: after the Guild had voted to admit members of non-editorial departments (R. 382), attempts were made by Young to force his department into a contract (R. 380-385). When Kavalosky accused Young of trying to form a company union (R. 384), he countered with an accusation that she was "getting outside advice" (R. 384). Young's efforts, however, were unsuccessful (R. 384).

In May, 1938, a strike was called by the Guild against the Citizen-News in protest over discharges. Kavalosky was on the picket-line. During the strike, Brandon saw her in a restaurant, and shouted at her:

"Helen, you had better get out of here because I want to sit down and eat lunch. I won't eat with a striker" (R. 385-386).

Helen told of the efforts of Zuma Palmer, daughter of Palmer, to discourage her from joining the Guild "in view of all that the Judge had done for all of the editorial department and for me, that she thought it was very ungrateful of anyone to join the Guild" (R. 387-388).

Not one of the incidents in this entire narrative was contradicted or questioned by the respondent. It produced only one witness, Palmer, who contented himself with

testifying to the paper's financial condition in order to justify certain discharges, with which we are not here concerned.

The respondent's position is that at the editorial employees' meeting with Palmer, he expressed disappointment that he could not reach an agreement with the Guild (R. 89). The record fails to support this, but does show that Palmer upbraided the employees at the meeting by demanding:

"What is the matter with you people? Don't you know what you want? Can't you make up your own minds? Do you prefer to have somebody in Washington or New York or some place dictate to you?"
(R. 234)

The foregoing evidence, substantial and uncontradicted, permits, nay compels, the conclusion that the respondent, through Palmer and his supervisory employees, missed no opportunity or occasion to deride and ridicule the Guild, to attempt to undermine its usefulness, to destroy its existence. The Board's findings to this effect are, therefore, completely justified.

Case 9995

In this case the Board found that the respondent had discriminated in regard to the hire and tenure of employment of Leonard Lugoff, thus discouraging membership in the Guild (p. 111), and had violated Sec. 7 of the N.L.R.A. by interfering with, restraining and coercing its employees in the exercise of their rights to bargain collectively and to join labor organizations of their own choosing (R. 112).

Leonard Lugoff; his discharge and reinstatement in August, 1938

Lugoff was employed in the classified advertising department as an outside salesman. In October, 1937, he joined the Guild. In May, 1938, a strike occurred (R. 187), but Lugoff did not go out with his fellow union members. As a result he was dropped from membership (R. 187). In August, while the strike was still on (R. 188), he took a two week vacation (R. 187). Upon his return he was discharged (R. 187), but reinstated by Palmer on probation till January 1, 1939 (R. 191-193). The basis for this probationary reinstatement is important, as it bears directly upon Lugoff's final discharge on March 30, 1940.

Palmer testified that the reinstatement was based upon Lugoff's plea that, inasmuch as five union members were being reinstated under a strike settlement agreement pending a Labor Board decision, he should be accorded no worse treatment, as he had not joined the strikers (R. 142-145, 580-581). Young was present at this conversation (R. 189, 555-6, 579, 581), and corroborated Palmer (R. 555-6). Then, according to Palmer, he reinstated Lugoff "on probation till January 1, 1939" (R. 191-193, 581), and gave him a letter to that effect (Bd. ex. 16, R. 193). Upon receipt of the Labor Board's decision (case 9994) on March 28, 1940 (R. 577) holding that the five union members had not been discharged in violation of section 8 of the Act, two of the five (three having resigned previously) were discharged, as well as Lugoff on March 30, 1940 (R. 147-148). On the other hand, Young stated that the *only* reason for Lugoff's final discharge was his "lack of production" and "nothing else" (R. 347).

Lugoff's story is entirely different, of course. He says that in his August, 1938, reinstatement was based upon his plea that prior to his conviction he had incurred a \$280 debt, upon the assurance of Tobin, his superior, that his job was safe, despite his failure to turn his guarantees (H. 186), and that his discharge was unfair (H. 195-199). Although Tobin denied that he had given Lugoff any assurance about his job, he admitted the conversation about the intended loan (H. 427), and did not deny that he made no reply when Lugoff accused him of first promising him that his job was secure and then firing him (H. 755).

At this point it should be noted that none of the five strikers, reinstated pursuant to the settlement agreement in August, 1938, was placed on probation, as was Lugoff. Only he received such a notice. Palmer himself admitted that he had not told Lugoff that he would be reinstated under the terms of the settlement agreement (H. 144).

These facts, plus Palmer's admissions, afforded the Board substantial evidence that Lugoff's reinstatement had nothing whatsoever to do with the strike settlement.

Lugoff's final discharge on March 30, 1940

Palmer insists that he discharged Lugoff only because the Board's order (case 2994) relieved him of the terms of the strike settlement agreement (H. 145). The evidence, as we have seen, does not support this. Young, however, places it on the ground of "unproductivity" and "nothing else" (H. 345). Is Young's story true, or is there still another reason—union activity?

Lugoff rejoined the Guild in February, 1939 (H. 196). Meanwhile his probationary period (Jan. 1, 1939) had come and gone, with no word from Palmer, Young or

Tobin (R. 194). He had every right to assume then that he had successfully passed the probationary period. Apparently he was right; as he kept his job for another year and a half.

Lugoff's complete record of earnings was put into evidence (pp. 174-6) together with a record of earnings for the 4 weeks immediately preceding March 30, 1940, of all the salesmen in his department (R. 205-8). These tables show that between May and August, 1938 (the months during the strike) Lugoff's earnings dropped sharply (R. 174). Between September and December, 1938, the probationary period, they rose substantially although not quite to the pre-strike level (R. 175). This was due in part at least, it can be fairly assumed, to a failure to regain advertisers lost through the strike (R. 167). Between January and June, 1939, his earnings remained on a par with those of his probationary period (R. 175-6). In July, 1939, through the efforts of Lugoff, all classified salesmen received a weekly guaranteed salary of \$24 (R. 176, 199). From then until his discharge, March 30, 1940, Lugoff's earnings were just a shade under his previous earnings, except for the month of March itself when they rose sharply just before his discharge (R. 177). This appears by comparing the figures on page 177 with the figures on pages 205-208, which show that the figures on page 177 for the 4 weeks in March are incorrect.

Lugoff testified that during the entire period between July, 1939, to March, 1940, his earnings equalled or bettered his \$24 guaranty only a few times (R. 199-200) but that he never was spoken to about it (R. 200, 213). He also testified, and the records bear him out (R. 201, 205-208) that in March, 1940, he was the second highest man in the department. *None of the four salesmen below him in productivity was discharged.*

Lugoff's retention beyond his probationary period shows that his productivity was satisfactory; as does the fact that he was able to persuade Tobin to establish a \$24 minimum salary at a time when he was not earning that much. Above all, his March, 1940, earnings which were substantially higher than the preceding months' earnings, cast grave doubt on respondent's claim that he was discharged for failure to produce.

There is evidence by Tobin, that Lugoff was lazy (R. 430-460) and did not follow up leads given to him between August, 1939, and March, 1940. Yet, his earnings after August, 1939, were no lower than before.

Beginning with his re-entry into the Guild, Lugoff became very active seeking members and circulating petitions (R. 195). The only other Guild member in his department was Helen Brichoux (R. 195). In August, 1939, Frank Gilman, credit manager, warned Lugoff to cease his Guild activity or he would be out of a job (R. 235), and that the next Presidential election would result in the abolition of the N.L.R.B. (R. 235). Gilman was not called to deny this, nor was George Palmer, in whose hearing it was said (R. 237). About March 15, 1940, two weeks before his discharge, Lugoff circulated a union petition (R. 226) among all the employees of the classified department, and in the presence of Tobin (R. 228).

The respondent's attitude toward the Guild ever since the strike, is indicated clearly by Palmer's statements, that the Guild and the Board were out to destroy the Citizen-Union (R. 164-5), and that he (Palmer) would not post notices in accordance with the Board's order "until the Court orders us to do so."

Another incident, indicative of respondent's attitude toward the Guild, was a statement by George Palmer, son

of one of the owners, that it was a fact that the management would close the plant if the Guild did not act "reasonable" (R. 218-219). This was not denied.

In the face of all this very definite evidence, the Board found that Lugoff's discharge was discriminatory and due to his union activity. It is supported further by the failure of Tobin to follow his usual routine when he had decided to discharge some one (R. 236) and by the fact that Palmer himself—not Tobin as would be customary—discharged Lugoff (R. 236). His discharge notice was mailed 8 P. M. Saturday and received that night at 10 P. M. by special delivery, a fact which points to a sudden decision suddenly acted upon.

The Unfair Labor Practices

In addition to the incidents already discussed in relation to Lugoff, the uncontradicted testimony supports the Board's finding of unfair labor practices. The publisher was merely acting in accordance with his avowed policy of defiance of the Board and resulting defiance of the Wagner Act itself.

According to Patricia Killoran, a Guild member who participated in the strike, Young denounced her and "all of you" for "all the things that you have done" and coupled it with an unmistakable reference to the Guild (R. 356). On another occasion, Killoran circulated a petition in the composing room, which was designed to make peace between Palmer and the Typographical Union through the good offices of the Guild.¹ All she got for her pains

¹ Despite Palmer's profession of sympathy for labor unions (R. 165), it extended only to a point where it did not affect his business (R. 165). The typographers in his plant were unorganized. Killoran hoped to achieve Palmer's recognition of the Typographical Union so that the respondent would not lose one of its large printing contracts (R. 357).

was a rebuke from Swisher that she was "always trying to stir up trouble" (R. 358-9).

The record contains additional unrefuted testimony of many other active indications of anti-Guild feeling and expressions on the part of supervisory employees, such as the denial of "by-lines" after the strike, to those employees who had previously rated this honor (R. 420). This was done, said Swisher, because he felt that advertisers would be offended and alarmed at seeing stories signed by Guild members who had participated in the strike (R. 421). This excuse is flimsy indeed. It is felt that those incidents already listed are more than sufficient to justify a finding that the respondent engaged in unfair labor practices.

It is to be remembered, of course, that whether, upon all the evidence, this Court would have come to different conclusions does not in itself justify a reversal of the Board's orders. So long as there is substantial evidence to support the Board's orders, this Court is bound by the findings of fact. *Appalachian Electric Power Co. v. Labor Board*, 93 F. (2d) 985 (U.S.C.C.A., 4 Cir.).

However, in this case, the Court may not be concerned over such considerations. It is clear that this case presents a picture of flagrant violations and open defiance of the law. Court action is indicated to support the remedial decisions of the Board.

Conclusion

For the foregoing reasons, the Board's petitions for enforcement of its orders in both cases should be granted, and the respondent should be directed to cease and desist from unfair labor practices, reinstate Leonard Lugoff

with back pay, and post notices that it will refrain from engaging in the activities from which it has been ordered to cease and desist.

Respectfully submitted,

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Nos. 9994 and 9995

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THE CITIZEN-NEWS COMPANY, a Corporation,

Respondent.

ON PETITIONS FOR THE ENFORCEMENT OF ORDERS OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENT.

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Summary of Argument.

I. The National Labor Relations Act is not applicable to respondent.

II. The Board's findings of fact on the matters in controversy are not supported by substantial evidence, and respondent has not violated Sections 8 (1) and (3) of the Act.

III. The Board's orders are not valid or proper under the Act.

ARGUMENT.

POINT I.

The National Labor Relations Act Is Not Applicable to Respondent!

The Board's findings with respect to business of the respondent do not take into consideration certain factors of importance in determining the question of whether a relatively small newspaper is within the jurisdiction of the Act. Not to exceed 10% of the total advertising revenue, and not to exceed 5% of the total revenues, of respondent come from advertising from outside of California. Only $\frac{1}{2}$ of 1%, approximately 130 copies, of the total circulation of approximately 26,000 copies were sent outside California, an inconsequential amount such as would merit no consideration either as a burden upon, or an obstruction to inter-state commerce or the free flow thereof.

The 1938 strike in the plant of respondent did not burden or obstruct commerce or the free flow of commerce in inter-state traffic, nor would a strike today in the plant of respondent either interfere with supplies or orders coming to respondent from without the State, nor would it tend to interfere, burden or obstruct commerce or the free flow thereof.

The case of the *National Labor Relations Board v. Hearst, etc.*, 102 F. (2d) 658 (1939—C. C. A. 9) quoted by appellant, expressly called attention to the fact that the strike did actually halt inter-state shipments, which was not true in the case at bar. It would appear that the

rule laid down in the *Hearst* case is not whether the respondent is engaged in inter-state commerce, but whether a labor dispute in its business substantially affects inter-state commerce or the free flow thereof. Respondent believes there is no evidence in the case to show that a labor dispute of its employees has any affect upon inter-state commerce. Similarly, the cases of the *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, and *National Labor Relations Board v. W. H. Kistler Stationery Co.* (1941) 122 F. (2d) 989, indicate that the percentage of out of state business is not controlling, and that the determining factor is whether or not a labor dispute results in an affect upon inter-state commerce so as to interfere, burden or obstruct the free flow thereof.

Other cases cited by the Board, such as *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1; and *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, involving mercantile concerns, where the affect of a labor dispute upon inter-state commerce can be readily ascertained, are not applicable to a small newspaper like respondent. So, too, *National Labor Relations Board v. A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4), involving a newspaper with such extended out of state operations as were designated by the court to be a "substantial volume of business" is not applicable to a small newspaper such as respondent.

The fact that certain of the raw materials going into respondent's publication came from without the State is also not controlling as to whether respondent is within the jurisdiction of the Act. *Santa Cruz Fruit Packing Co. v. National Labor Relations Board* (*supra*).

POINT II.

The Board's Findings of Fact on the Matters in Controversy Are Not Supported by Substantial Evidence, and Respondent Has Not Violated Sections 8 (1) and (3) of the Act.

(A) CASE NO. 9994.

The Board held there was no refusal to bargain, and that respondent did not discriminate with regard to the hiring and tenure of employment of Johnson, Scott, Yeaman, and Schlichter, to discourage membership in the Guild.

The Board found [A. R. 135]:

“That by the continuing expressions of criticism and disparagement of the Guild, the criticism of the use of outside negotiators, the attempt to secure contracts with employees' committees in the various departments, the threat to cut wages in the event that the classified advertising department employees failed to sign a contract, and the threat to discharge employees if a contract with the Guild was consummated, the Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.”

This finding is not supported by substantial evidence and the conclusion is unjustified.

The Board states [A. R. 129]:

“In September and October 1936 the Los Angeles Chapter of The American Newspaper Guild and the Citizen-News Chapter thereof were organized. At various times thereafter certain supervisory employees made disparaging remarks about the Guild. Thus Harold Swisher, Harwood Young, and Harold Wynn, who are respectively managing editor, business man-

ager, and assistant business manager of the Citizen-News, commented unfavorably on the Guild's emphasis, on 'economics' rather than 'ethics' in conversations with Roger Johnson and James Crow, editorial employees of the Citizen-News. Swisher, and at a later date, Harry Brandon, display advertising manager of the Citizen-News, criticized Guild settlements of strikes, the former saying that he did not see what had been achieved by the strikes and the latter, referring to a particular strike, stated that he would be ashamed to belong to an organization that was party to such a settlement."

The Board then states [A. R. 129]:

"In June 1937 the American Newspaper Guild held a convention at which it voted, subject to a referendum, to join the C. I. O. and admit non-editorial employees to membership. About this time Swisher in speaking to Johnson questioned the advisability of the Guild's affiliating with the C. I. O."

Johnson's testimony continues [A. R. 247]:

"Mr. Swisher, the managing editor, talked to me about the Guild and wondered if it was right for the Guild to go into the C. I. O. He felt, he said, that the C. I. O. was a step, perhaps, too far for newspaper men to take at that time."

The Board continues [A. R. 129]:

". . . in the fall of 1937, in connection with stories concerning strikes, he remarked to James Lindsey, Herman Reuters, and John Watts, editorial employees and Guild members who worked at the copy desk, that he believed in unions, but thought that the C. I. O. was carrying things too far. He inquired, 'You fellows belong to the C. I. O., don't you, the Guild?'"

These expressions on the part of Mr. Swisher were merely legitimate expressions of opinion upheld by the Supreme Court in *National Labor Relations Board v. Virginia Electric & Power Co.* (Commerce Clearing House, 5 labor cases, Section 51,124, decided December 22nd, 1941), 62 S. Ct. 344, and in no wise constituted either interference with the rights of the Guild members or restraint or coercion upon them. Lindsey, Reuters and Watts continued in their Guild membership and in the employ of respondent up to the time of the strike in May, 1938.

The Board's finding [A. R. 130]:

"On one occasion after the Guild Convention, Young asked Johnson whether the Guild intended to organize the business department. At another time, the date of which does not appear in the record, he expressed the belief that the Guild should be limited to the editorial department."

Certainly such comment by Mr. Young was legitimate expression of opinion, and the record reveals no interfering, restraining or coercion of the same upon Johnson's activities which he exercised freely and fully up to the time of the strike. Johnson's testimony also warrants further examination since he was [A. R. 237] "one of the first temporary presidents" and "was the first newly elected president" in September, 1936, when the Guild was first organized. [A. R. 235.]

During the campaign for the election of Judge Palmer, general manager of respondent, as District Attorney, Johnson said [A. R. 237]:

"I was invited at one time by the managing editor, Mr. Swisher, to speak on the radio from my desk

during the period of broadcasts that the Citizen News had for about a week. He asked if I would mind being introduced as the Guild president. I said no, although I was rather surprised, because that had never been done before, and I felt a great feeling of warmth because of it.

"He also asked me if I would mind talking about the Guild and explain its objectives briefly when I was on the air."

Johnson also testified [A. R. 244]:

"I remember very specifically a happy occasion in January when my wages were increased to \$45, and in February of that year I was invited to go to the National Orange Show . . . Mr. Swisher took great delight in introducing me to some of his friends in the newspaper business in San Bernardino and elsewhere, as President of the Los Angeles Newspaper Guild, and kidding them and telling them that perhaps soon I would be over in San Bernardino to organize, too."

Also, [A. R. 244] Johnson participated one Sunday in a baseball game between teams representing the Citizen News editorial staff and the composing room. Judge Palmer was playing with them. "It was an exceedingly friendly baseball . . .". Johnson broke his ankle and at the hospital [A. R. 245] he had calls from

"Zuma Palmer, Judge Palmer's sister, Mrs. Harold Swisher, the managing editor's wife, Mr. C. D. Thompson, secretary to Judge Palmer. Mr. Thompson at the outset told me that Judge Palmer stood ready to help me financially at the hospital, . . ."

Henry Reynolds [A. R. 463], a witness called by the Board, applied to Swisher for employment as a copy reader. Swisher

“couldn’t tell me immediately whether there was work there for me. He asked me if I was a member of the Guild. I said, ‘Technically I probably am not, because I am in arrears on my dues, but I am for the Guild and believe in the Guild.’ He said, ‘Oh, I do, too, but I don’t think the Guild should dictate who the Management should hire, do you?’ He said also that ‘We have 100% organization here, and Mr. Roger Johnson is one of the former presidents of the Guild.’”

There appears to be no testimony to support the Board’s finding that Swisher talked “economics” and “ethics” with Crow. We do find, however, [A. R. 397] Crow testifying in reference to Swisher.

“He said, for example, in the case of the Brooklyn Eagle strike, that he didn’t see what they had gotten. He said the same thing about the settlement of the Seattle Post-Intelligencer strike, and the same thing of the Seattle Star strike.”

Crow’s position as Guild leader was well known to Mr. Swisher, and yet there is not the slightest evidence of any interference with Crow’s activities. His comment that the Guild had gained nothing from certain strikes was again an expression of his own opinion which he was entitled to make.

Crow relates [A. R. 411]:

“Mr. Swisher had spoken to me about guild shop and had asked me to explain to him in a conference in his office between himself and me. I explained

Guild shop to him, and he told me that that was not the way it was explained in the first contract proposal . . . Mr. Swisher said to me at that time, 'I have no objection to telling a man that he has got to become a member of the Guild when he gets a job here.' "

Regardless of whether Mr. Swisher was reflecting his own opinion or that of the Management, as the Board charges, his attitude would not constitute interference, restraint, or coercion.

Johnson described his relations with Mr. Young [A. R. 239]:

"In late December (1936), I met Harwood Young, the business manager of the Citizen News, . . . He asked me if I could get for him some information about wage schedules and other working conditions which had been put into effect on the four downtown papers about a month before . . .

"I obtained the information for him, leaving the office and coming back with it . . . I went to Judge Palmer's office, . . .

"I presented the information to both of them (Mr. Young and Judge Palmer) . . . I explained that I was in the Guild because I felt that newspaper men, acting as individuals, could not make the progress that they could by banding together . . . I laughed and pointed to Judge Palmer and I said 'I don't blame you or any of the other publishers as individuals. I blame the system' . . . Mr. Young and Judge Palmer laughed heartily at that. On the whole, it was a very splendid meeting, and I felt that if the Judge and Mr. Young understood my position in the Guild that they would be sympathetic."

In October (1937) Johnson [A. R. 255]:

“went to Harwood Young, business manager, and told him that some of the display men were complaining to me that they were being required to work Saturdays now which was something that had not been required of them very much in the past . . . that the display men felt that their interest in the Guild and their activities in the Guild had aroused the ire of Mr. Brandon who had ordered the Saturday work . . . that if the men were required to work on Saturdays that it was essential they be given an explanation as to that and should be told by him or some person in authority that it was not because of their Guild activities . . . [A. R. 256.] He (Young) said yes, that Mr. Brandon had done this thing hastily; that it was a bad thing to do; and that Mr. Brandon in the past had from time to time caused the management embarrassment because of his quick temper . . . the conversation ended when he told me that he would talk with Mr. Brandon and see if he couldn’t correct the misapprehension and have some of the men, perhaps, not come down on Saturday if the display department could operate efficiently that way.”

Johnson further said [A. R. 257]:

“Several times I was permitted, with the permission of the management, either Judge Palmer or Mr. Swisher, to do some outside publicity work . . . Harwood Young [A. R. 258], the business manager, asked me if I would like to handle Santa Claus Lane publicity . . . I repeated the same thing last year; that is, in December, 1937, again at the request of Mr. Young . . .”

Mr. Crow says of Mr. Young [A. R. 398]:

“A matter of which Mr. Young spoke to me about on several occasions was the Guild’s use of outside negotiators. His favorite objection to the Guild’s use of outside negotiators was the fact, as he called it, that it put Judge Palmer in the position of the less reputable publishers. And I answered him by saying that we weren’t necessarily calling a man an adulterer to ask him to abide by the ten commandments.”

Mr. Young, just as Mr. Crow, had a perfect right to express his opinion as to methods used in collective bargaining negotiations, such arguments involved in collective bargaining are not interference with the rights of workers and the Board has already found that the respondent did not refuse to bargain.

Mr. Wynn’s conversations with Mr. Johnson were, according to Johnson, as follows [A. R. 246]:

“He particularly asked me from time to time when the Guild was going to ask for a contract with the Citizen-News . . . I told him that . . . we didn’t know when we were going to the Citizen-News . . . He said that he wondered if the Guild was not paying too much attention to the economic phases rather than to the ethical phases. [A. R. 247.] My reply to that always was that I felt that the Guild should not emphasize the financial and economic phases so much, and that it should pay a great deal more attention to the ethical part of it, and to the matters that pertained to the freedom of the press and the ability to write frank and honest news.”

Such conversation between Mr. Wynn and Mr. Johnson does not reflect any attempt on the part of the management to interfere with, coerce or restrain employees in the exercise of their organizational rights. On the contrary it reflects, if anything, a friendly recognition of those rights—a recognition that Roger Johnson was a leader in the organizational activities and that it was expected that he would carry on his activities according to his own plans without interference in any manner from the management. All of Johnson's testimony as to his union activities indicates clearly that he carried them on freely, openly and without restraint, interference or coercion.

The Board finds [A. R. 130]:

“On one occasion the manager of the classified advertising department told Karl Schlichter that Palmer would never sign a union contract and that the editorial employees were making a mistake seeking higher wages.”

The exact testimony as it appears in [A. R. 278] is as follows:

“He said that he thought that the editorial workers were making a serious mistake to attempt to get higher wages. I said why did he think so. He said, ‘Well, the judge will never sign a union contract.’”

The history of the negotiations, as reflected in Board's Exhibit No. 4 [A. R. 283-362], is conclusive evidence of Palmer's willingness to bargain, to put into writing and to sign a collective bargaining agreement. Note also the testimony to the same effect of James Francis Crow, Chairman of the Hollywood Citizen-News Unit [A. R. 415 to 449 incl.].

Miss Kavalosky, a witness called by the Board, a classified employee, testified about Tobin as follows [A. R. 385]:

“The very day the strike was called on Tuesday, my boss, Mr. Tobin, approached me on the picket line and invited me to lunch. While we were sitting and having lunch, Bill Hawkins, who is Judge Palmer’s brother-in-law, came in and sat with us, and also Pat Killoran, the fashion editor who joined the strike, and my boss seemed very much concerned because I had worked my job up to the point where it was better than it had ever been in the nine and one-half years that I had worked there, and he assured me that he felt I was very sincere in my move; and also told me that he had more respect for me on the picket line than he had for any people that had walked through the picket line and had gone to work in the plant. And at the same time we were sitting there, he merely said to me that he hoped that everything went well with me, and wished me good luck.”

The Board next says [A. R. 130]:

“The burden of discouraging union activity among the employees of the business department seems to have been taken up by Brandon, the display advertising manager.” [A. R. 131.] “In October, 1937, Brandon applied for membership in the Guild and urged Johnson to secure his admission. The Guild refused to accept him as a member, fearing that his move was an attempt to dominate the Guild or at least the advertising salesmen in it.”

The fact that the Guild did not recognize Brandon as representing the management is established by the testimony of Roger Johnson, heretofore quoted, to the effect

that Johnson went to Young as a person in authority to ask that Young change Brandon's orders in reference to Saturday work. Karl Schlichter, a Board witness and a member of the Guild, whose activities were not interfered with in the least, testified [A. R. 280-281] as follows:

"S. C. Montrose, one of the salesmen, arose and said that he would move that we ask the management to give more authority to Harry Brandon, sales manager, inasmuch as he had some very good ideas that he was never permitted to carry out; that he didn't have the right to select his own staff. Jim Fisher got up and questioned him to this effect: 'Do you mean that you want us to suggest that Harry Brandon, our boss, be given the right to hire and fire?' He said, yes, he thought that Harry Brandon should have that right. It wasn't very long after that that Harry Brandon requested membership in the Guild, and at a Guild meeting at which his application was brought up, Montrose spoke at some length, possibly two hours, without interruptions, . . . in favor of the acceptance of Brandon's application. I discussed this matter with Jim Crow, Jim Fisher, and others, and I told him that I *felt* this was an attempt to have Brandon dominate the Guild, and that I was very much against the acceptance of Brandon as a Guild member."

Schlichter said that he "*felt*" and the Board concluded that "The Guild refused to accept him as a member, *fearing* that his move was an attempt to dominate the Guild."

Such a misinterpretation of testimony is neither substantial nor acceptable evidence. Schlichter's testimony clearly indicates that Brandon did not have the right to

hire and fire and that he had very limited authority from the management.

Schlichter further said of Brandon [A. R. 282]:

“Brandon said that if he were a member of the Guild he would be very much ashamed to belong to any organization that had settled the dispute which involved the lowering of salaries of some of the workers on the paper . . . He said that the editorial workers on the Citizen-News were not worth greater salaries than they were getting; they couldn't possibly hold a job on any other paper, any other metropolitan paper.”

Schlichter's testimony reveals nothing other than an argument over the Guild between two employees, one of whom had been denied membership and the other of whom had advocated the denial. There is not an iota of testimony to support, and the testimony actually disputes, this finding by the Board [A. R. 131]:

“Thus for a period of over a year, the respondent conducted a campaign of criticism and disparagement of the Guild. The purpose of the campaign is made all the more apparent by virtue of its relative intensity in the business department shortly before and after June 1937 when the Guild convention voted to extend its jurisdiction to employees of that department.”

The evidence reveals that business department employees were freely joining and participating in Guild meetings and activities. Lowell Redelings, a witness called by the Board, testified [A. R. 464]: That on the morning of the strike there were 25 paid-up members in the Citizen-News Unit of the Guild and 23 other members who were not paid up. Of the 25 paid-up members nine were in the

editorial department. Sixteen of the 25 paid-up members were therefore members of the business department. This indicates that the Guild, until it called the strike with the vote of 12 members [A. R. 366], was making as good headway in the business department as in the editorial department.

The Board finds [A. R. 132] that:

“When the editorial department employees informed Palmer that they would not violate the Guild constitution and deal directly with him through a committee, Palmer asked, ‘Don’t you know what you want? Can’t you make up your own minds? Do you prefer to have someone in Washington or New York or some place dictate to you?’ ”

Mr. Crow, Chairman of the Citizen-News Unit of the Guild, a witness testifying on behalf of the Board [A. R. 399-400] [A. R. 414-416] gives us the story of this meeting:

“I was spokesman for this meeting . . . Judge Palmer said, taking a piece of paper and placing it before him on the desk, ‘What I want is a schedule of wages and a schedule of hours.’ We said that we did not propose to name figures and wages, or name any schedule of hours specifically . . . the Judge said ‘What do you want,’ we said that we wanted to be represented by the Los Angeles Newspaper Guild . . . [A. R. 400.] Subsequent to that conference, there were certain adjustments made in salaries in the editorial department. A noteworthy feature of the adjustments was the fact that I was given a \$5.00 increase in salary, and the title of drama editor which was held previously by Miss Elizabeth Yeaman . . . [A. R. 401.] Mr. Swisher told me that the order was not his own; that it had come from Judge Palmer.”

Mr. Crow was asked [A. R. 413]:

“Didn’t you also at that time suggest raises for other people besides the drama editor? A. We did not name any person . . .

Q. [A. R. 414.] To refresh your recollection, didn’t you also at that time suggest on behalf of this committee a raise for Mr. Scott? . . . A. I think we suggested a raise for Mr. Scott, and also many others.

Q. Did you also suggest a raise for Mr. Reuter? A. We suggested that one of the positions for which a peak or unusual salary should be paid was the position of Number One man on the copy desk.

Q. And the position that you were talking about at that time was that held by Mr. Reuter, wasn’t it? A. [A. R. 415.] In my own mind, I assumed at that time that that was Number One position on the copy desk, although Mr. Swisher might have assumed something different.

Q. Now, as a matter of fact, you also suggested at the time a raise for Claude Newman, didn’t you? A. We suggest that the position of sports editor should be paid a salary higher than that of the dead level salary.

Q. As a matter of fact, isn’t it true that all these three, in addition to yourself, were given raises shortly thereafter? A. I know that I was given a raise shortly thereafter. I believe I can say that is true.

Q. And it is true as to the other three, too; is that correct? A. That was.”

The Board refers to negotiations with the classified department, saying [A. R. 132]:

“When the classified-advertising department employees, being desirous of acting through the Guild, re-

fused to sign the contract offered by the respondent, Young informed them that their salaries would be the first to be reduced in the event that business decreased since the other departments would be protected under their contracts.”

Helen Brichoux Kavalosky [A. R. 378], a witness called by the Board, started to work for the Citizen-News on January 2, 1929, went out on strike on the morning of May 17, 1938, sold classified advertising for almost nine and one-half years, was a member of a committee of her department that called on Mr. Young late in June, 1937. She testified [A. R. 380] that there was a meeting every morning for about a week, at least five or six, all of which she attended, to discuss individual and collective job problems and working conditions. Next to the last session that the committee had with Mr. Young [A. R. 382] Miss Kavalosky

“Asked him why we should have to sign an agreement with the Company to get a raise. I said that we had never had to sign an agreement before with anybody [A. R. 383]; I mean, we weren’t the kind of people that worked under a contract or anything, and we just wanted to improve ourselves; that we worked for the Company a long time; we always trusted the Company, and they certainly always trusted us. There was no reason why we should break our word. And I asked him if he wanted us to sign the agreement, and before he could answer me, Mr. Tobin, my boss, spoke up and said, ‘Why certainly you want them to, don’t you, Harwood?’ Mr. Young quickly said, ‘No, no. They can do what they want.’”

The Board says [A R. 133]:

“It is apparent that the respondent altered its policy of dealing with its employees in order to head off the organizational campaign of the Guild.”

There is not an iota of evidence, substantial or otherwise, to justify this statement. /

The Board in its findings [A. R. 133] refers to a conversation that Jake Calkins, a Guild member, had with Mr. Swisher and other conversations that Swisher had with Swan and one that Swisher had with Crow with reference to Swan, and another that Young had with Schlichter in reference to Stan Speer. We call the court's attention to the testimony [A. R. 452, 455-457] in reference to Calkins; the testimony [A. R. 461 and 483-485] in reference to Swan; and [A. R. 375-376, 483] in reference to Speer, none of which supports the Board. It does indicate that during the period of bargaining with the Guild, Mr. Swisher and Mr. Young legitimately sought to point out weaknesses in the Guild's demands.

Calkins.—[A. R. 452, 455-457]: At the negotiation meeting the night before, Garrigues in arguing against combination jobs in general had used in one of his general explanations the term speed-up and stretch-out. The following morning I had completed my writing portion of my job, and along about 11:00 o'clock I had a series of phone calls to make. In the interval I was sitting at my desk. Mr. Swisher arose from his desk which was about 30 feet from mine and walked to me and said “Jack I don't understand you.” So I started to pursue the subject a little further and he turned his back and went back to work. That afternoon after the paper had gone to press things had relaxed a little bit in the office, and I went

into Mr. Swisher's private office and told him that I did not see what was behind his remarks to me. I couldn't understand why he had singled me out for either of the two comments that had been made that morning and that apparently there was some misunderstanding in his mind. *I wanted to know what it was.* He said, "well, it's this argument about the reporter and photographer business at the meeting last night." And I said "Well, you know it's the Guild position to combination work on any staff, and it is written into almost every Guild contract in the country, with the necessary exceptions." I forget further details of the conversation, except toward the end he said, "Well, Jack, the Guild is off on a wrong foot this time. *I'd be willing to scrap for more money for you guys,* but the 5-day week wouldn't work in this staff. I told him I couldn't discuss that matter with him, and I said it was a matter for open discussion. Any discussion between the Guild and himself was the matter for discussion by the negotiators before the observers. I was only there to try to iron out the remarks to me. He said that was all right, and he said he was glad I talked to him.

In re Swan.—By Swan [A. R. 461]: He (Mr. Swisher) said that if the management had granted us the wages or other provisions of the contract it would be necessary to retrench and I would have to go. By Crow [A. R. 483-485]: Mr. Swisher spoke directly to me about Al Swan during the course of the negotiations. At one time he said that the negotiations were presenting the management with a very difficult problem in the matter of Al Swan, because Mr. Swisher said that I knew as well as he did that A. Swan would never make a reporter—I did not, by the way, conclude on that state-

ment—"and if this contract goes through the way you fellows want it, the only thing we can do is give him his severance pay and let him go."

In reference to Speer.—By Crow [A. R. 483]: He is referred to ordinarily as an office boy. He handles the printing room work and he does, or did, rather, writing for the sports department. Q. In what way did negotiations effect Mr. Speer's position? A. . . . by the statement from the management that in one case this sports writing done by Speer was something that should be dispensed with, and by referring to it as fun rather than as a legitimate part of the work done in the editorial department. By Schlichter [A. R. 375-376]: I was in his (Mr. Young's) office discussing my work, and brought up the fact that business was very poor, and said, of course, the Guild people didn't take that into consideration when negotiating for a contract, and he said, as a matter of fact, the negotiators are not interested in getting a contract, they wanted to prolong the discussion in order to get more money and then discussed one thing after another with regard to this contract . . . severance pay . . . progressive wage scale. He mentioned two people, one by name, whom he said they would have to get rid of. Q. Who was that? A. Speer . . . He said that they could not possibly let him progress to a higher pay because of a speech defect, because he couldn't do the work.

The Board, it clearly appears, is erroneously attempting to hold that in bargaining with a union an employer must not say anything in his own behalf but must accept every demand and agree with every statement made

on behalf of the union. The evidence establishes that respondent took no action that interfered with the right of its employees to join a union of their own choosing, that the employees exercised that right and that the respondent bargained with representatives of their union.

Johnson, Crow, Schlichter, Swan, Speer, Reuters, Calkins, Kavalosky, Killoran and Lindsey were all members of the Guild participating in its activities without interference or restraint. Nothing said to them by any representative of respondent did anything more than to cause their disapproval. It didn't affect their exercise of their rights in the least.

(B) CASE No. 9995.

The Board's order in this case is based upon findings of fact that are not supported by substantial evidence.

The Unfair Labor Practices.

A. Background.

Under the designation of "Background," the Board says [A. R. 90]:

"In order to remedy the effects of respondent's interference, restraint and coercion, the Board ordered the respondent to post notices stating that it would cease and desist from such conduct. The respondent has not complied with this order. Harlan G. Palmer, president of the respondent, stated at the hearing in the instant proceeding, 'We have no intention to do so until the Court orders us to do so.' Nor has the respondent complied with the Board's order in an-

other case decided September 1, 1938 in which the Board concluded that the respondent had engaged in unfair labor practices in violation of Section 8 (1) and (2) of the Act."

The Board omitted saying that while it had seen fit to ask the Court for an enforcement order in a case decided on March 26, 1940, it still had not asked the Court for an enforcement order in a case decided September 1, 1938. Respondent does not apologize for the fact that it believes the Board is in error in all of its charges against respondent.

B. Interference, Restraint and Coercion.

The Board finds [A. R. 91]:

"Immediately after the editorial employees returned to work, however, they were deprived of their by-lines because, in the words of Swisher, the city editor 'the ill will created during the strike made it difficult for readers, particularly advertisers, to see the name of various former strikers without becoming alarmed at the name, recalling old feelings from the strike.' We find that the strikers were deprived of their by-lines because of their participation in the strike."

From the above quotation by the Board, it is apparent that any deprival of by-lines was not because of participation in the strike but because of conditions that existed after the strike. There is more to be noted in this connection:

1. The Board's complaint raised no issue as to by-lines. X

2. The only testimony as to by-lines was that of Roger Johnson [A. R. 418-426]. Johnson said that prior to the strike some of the people used by-lines on their stories, that by-lines were eliminated after the strike and were "not immediately" given to the people who had been on strike. There was not an iota of evidence that at the time of the hearing, or the filing of the complaint, the Guild or any employee was raising any issue about a by-line. The statement of Johnson "not immediately" means that by-lines were eliminated for only a very brief period. It should be borne in mind also that Johnson resigned as an employee of respondent in October, 1939. [A. R. 422.]

3. An examination of the Board's Exhibits 17A, 17B, 17C, [A. R. 606, 615-616, and 625] reveals that in the three different contracts with the Guild, two of them subsequent to the Board's decision in Case No. 9994, the matter of by-lines was covered completely in the agreements as follows [A. R. 606]:

"The publisher agrees that no employee shall be required to have published under his own name any material containing an expression of opinion not in conformity with his own opinions. Nor shall the by-line of any employee be used without his consent."

In other words the question of whether by-lines were to be used at all was entirely a matter of discretion for the publisher excepting that the by-line of an employee could not be used without the employee's consent.

The conversations between Killoran and Young to which the Board refers [A. R. 92] as indicating that the respondent interfered with union activities of its em-

ployees, plainly indicates the contrary. Young made some comments on union matters and then said [A. R. 355-6]: "I can't talk about those things because I am not allowed to," but Killoran replied, "Weil, I can talk about them."

The statement of Mr. Swisher cited by the Board [A. R. 93] does not indicate interference with union activities. The National Labor Relations Act, as the Supreme Court has said in *National Labor Relations Board v. Virginia Electric & Power Co.* (*supra*) does not deprive employees of the right to express their opinions. Killoran said [A. R. 382] that after she had circulated a resolution in the composing room Mr. Swisher told her he wanted her to keep out of the composing room because she was causing trouble out there just as she was causing it down stairs every time she had a chance. [A. R. 383.] When she put an item on the Guild's posting board in the editorial room to the effect that the Guild was the victor in the Chicago strike, Swisher said that anybody who would put up a false statement like that couldn't be trusted to do anything. [A. R. 384.] Mr. Swisher, she said, also told her that the Guild was not a reputable organization. He told her that the Guild had lost the Chicago strike. The merits of the arguments need not be gone into. Swisher had a right to his opinions and Killoran to hers. Killoran kept right on with her activities and kept her job.

The Board says that Herbert Sternberg, who talked with Killoran, was classified advertising manager. Sternberg, according to Killoran, told her that she had made a monkey out of herself during the strike and that the

C. I. O., the Guild and the strikers were terrible. Herbert Sternberg was not classified advertising manager, was not a supervisory employee with right to hire and fire, and there is not a scintilla of evidence to that effect. But either as a supervisory employee or a fellow employee, he had a right to express his opinions about unions just as Killoran freely expressed herself.

When the Board says, therefore [A. R. 93]:

“By the statements of Young, Swisher and Sternberg, and by its action in depriving the strikers of their by-lines, the respondent has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act,”

the Board makes an unsupported finding. Killoran was the President of the Citizen-News Unit of the Guild at the time of the hearing [A. R. 378], the Chairman of the Boycott Committee during the strike [A. R. 375], the editor and circulator of 12 to 14 [A. R. 380] different bulletins mailed to other Citizen-News employees for the purpose of winning members for the Guild [A. R. 390], the advisor of Lugoff and the drafter of his petitions [A. R. 412], the circulator of a Guild resolution among members of the mechanical force [A. R. 361], the advocate of union membership at the front business counter of respondent during business hours [A. R. 414], the conductor of union activities whenever she had free time [A. R. 378], the carrier of a banner declaring “Judge Palmer, Law Violator” [A. R. 374], the poster

of notices and published items on the Guild bulletin board in the editorial rooms [A. R. 383-4], an employee of respondent, at the time of her testimony, for 12 years [A. R. 350]; certainly she was not interfered with, coerced or restrained in her activities and yet she is the Guild member upon whose testimony as to her own experiences the Board relies to sustain the finding of coercion and restraint.

The conclusions drawn by the Board as to coercion and restraint are also completely disproved by the testimony in the case. Palmer testified that he was not opposed to unions, that he had issued notices to that effect [A. R. 568, 571-4], that the business agent of the Typographical Union had stated correctly in a National Labor Relations Board case (in 1937) that Palmer had always told him that whatever the majority of his employees wanted they could have [A. R. 166]. The three contracts made with the Guild show that he did bargain with union representatives. The petition which Lugoff said he was circulating on March 15, 1940 states Palmer's readiness to recognize unions [A. R. 227]. The resolution circulated by Killoran in the composing room [A. R. 361] contained a statement that the management would look favorably to the mechanical men joining the A. F. of L. Typographical Union. Many employees of respondent attended Guild negotiating meetings and continued in respondent's employ. [A. R. 324-326.]

Statement of Lugoff Case.

Leonard Lugoff was a salesman of classified advertising employed by the respondent, The Citizen-News Company, from 1934 [A. R. 183] to March 30, 1940. [A. R. 235.] He worked for the Hollywood Daily Citizen from 1926 to 1928 [A. R. 181], went to work for the Hollywood News in 1928 [A. R. 242], came back to Hollywood Daily Citizen a year later [A. R. 243], where he was discharged before 1930 [A. R. 243], worked on Beach papers for a short time, came back to the Hollywood News and was there when the Hollywood Citizen purchased the Hollywood News in 1931. He was employed by The Citizen-News Company for about a year when he quit. [A. R. 244.] He was then employed by the Los Angeles Herald for five or six months [A. R. 245], then on a local newspaper serving Venice and Culver City for about a year [A. R. 245], then didn't do anything until he obtained employment in the circulation department of the respondent in January, 1934. [A. R. 245.] In six months he obtained employment in the classified department of the same institution.

His department head was J. R. Tobin, who held the title of classified advertising manager. [A. R. 427.] Above Mr. Tobin in the organization was T. H. Young, who held the title of business manager. Harlan G. Palmer was general manager with authority over both Tobin and Young. [A. R. 130.]

In May, 1938 a strike was called against respondent by the Los Angeles Newspaper Guild to compel the reinstatement of five discharged employees. Leonard Lugoff was a member of the Guild at that time [A. R. 259]

but refused to join the strike and gave up his union membership. Helen Brichoux Kavalosky was the only member of the classified department to join the strike. [A. R. 260.] Before the strike three-fourths of the classified department employees were members. [A. R. 259.] There were about twelve employees in the department. [A. R. 265.]

The five discharged employees were Roger Johnson, Mellier W. Scott, Jr., Elizabeth Yeaman, Helen Blair Thurlby and Karl Schlichter. [A. R. 576-577.]

While the strike was in progress the N. L. R. B. held a hearing on charges filed by it against the respondent. On motion of the Board's attorney the charges as to Helen Blair Thurlby were dismissed. At the conclusion of the hearing the Board's Trial Examiner held that the discharges of the four were discriminatory and because of union activities.

Following the hearing before the Board's Examiner an agreement was reached for the settlement of the strike. [A. R. 563.] A copy of that agreement appears in the transcript as Exhibit A of the Answer. [A. R. 17 to 21.] The agreement provided that the strikers, including the discharged employees, were to return to work pending the final decision in the N. L. R. B. case. In the event the discharges were finally held to have been legal and not discriminatory, the discharged employees were to immediately resign or to be subject to discharge. The contract signed with the Guild at the same time [Respondent's 17C, A. R. 618 to 626] provided there were to be no discharges of any of the strikers for economy reasons prior to January 1, 1939. In July, 1938,

shortly after the settlement of the strike, Leonard Lugoff was discharged by Mr. Tobin. [A. R. 272.] He took his complaint to Palmer, general manager, and was reinstated. [A. R. 580.]

On the 28th day of March, 1940 [A. R. 582] the respondent received copy of the decision of the N. L. R. B. finding that the four discharges were not discriminatory and dismissing the charge in relation thereto.

Prior thereto Roger Johnson, Mellier W. Scott, Jr. and Helen Blair Thurlby had resigned. [A. R. 576-577.] On March 28, 1940, the date of the receipt by respondent of a copy of the Board's order there remained of the original five in respondent's employ, Elizabeth Yeaman and Karl Schlichter. [A. R. 576.] On March 30, 1940, Palmer, respondent's general manager, gave notice to Yeaman and Schlichter of their discharge. [A. R. 581-582.] At the same time he discharged Leonard Lugoff. The Board thereafter filed this action against respondent, charging that the discharges of Schlichter and Lugoff were in violation of the National Labor Relations Act. No charge was filed because of the discharge of Elizabeth Yeaman. Both the Board's Examiner and the Board held Schlichter's discharge to have been for good cause and not unlawful [A. R. 109] and at the same time held the discharge of Lugoff to have been unlawful. [A. R. 105.]

The Discharge of Leonard Lugoff.

To sustain the Board's conclusion that the respondent discharged Leonard Lugoff because of his union activities, the Board must impeach the testimony of the respondent's general manager, Harlan G. Palmer, who did the discharging, and who testified as to his reasons therefor. Palmer's testimony is direct and positive. He knew his reasons. The Board supports its conclusion by unsubstantial evidence, by surmises and guesses and does not impeach the direct evidence.

As a witness called by the Board, Palmer testified that at the time Lugoff was discharged in August, 1938 [A. R. 141] he reinstated him following a conversation with Lugoff in which Lugoff said [A. R. 142]:

“that the strikers had been returned to their jobs, that five people we had discharged for economy were being reinstated until the end of the N. L. R. B. case, and that he, Lugoff, had not gone on strike and he did not believe that he should receive any less treatment than those who had been on strike.”

Thereafter Palmer told Young [A. R. 143] that there was a great deal of merit in Lugoff's appeal and that since the company was taking back other people pending decision in the N. L. R. B. case there was no reason why Mr. Lugoff should not be given equal consideration.

Question by David Sokol (Board's attorney) [A. R. 145]:

“Q. Now, why did you take Mr. Lugoff back in August, 1938? A. Because if we could take

back the others under force there was no reason why we shouldn't take Mr. Lugoff back under a gentlemanly appeal.

Q. Now under the same reasoning why didn't you extend your leniency to that particular day in March, 1940 when you discharged him? A. The reason then has (had) ceased to exist."

When Palmer was called as a witness on behalf of respondent [A. R. 563] he testified further [A. R. 580]:

"Mr. Lugoff told me that he had been discharged by Mr. Tobin . . . the Saturday before, and that he wanted to appeal to me on the basis of the injustice of the discharge, that we were taking back five people over which the strike had been waged whom we had claimed we could do without, whereas he was producing something for the Citizen-News and he thought it wholly unfair to discharge him, who had not been on strike, when those five were being reinstated . . . " [A. R. 581]. "I talked the matter over with Mr. Young, told him that I believed there was merit . . . in the basis of Mr. Lugoff's appeal, that it was unfair to him to lay him off at that time while five others were being reinstated, whom we had laid off prior to him, and that we had agreed that there would be no economy discharges of members of the Guild prior to January 1, 1939, and that I thought it fair that Mr. Lugoff be reinstated . . . He was reinstated . . . on my orders."

[A. R. 581-2]:

"Q. When Mr. Schlichter and Mr. Lugoff were discharged on March 30, 1940, how many days elapsed between receipt of word by you that the N. L. R. B. in Washington had decided that the

five discharges were not discriminatory and were not unfair labor practices and the time of the discharges of these two gentlemen? A. We received the word in the early morning mail Thursday.

Q. And that was Thursday, March 28, 1940? A. Yes, sir . . . I waited two days before discharging Mr. Schlichter and Miss Yeaman. There was nothing to wait on Mr. Lugoff. Mr. Lugoff's decision was reached on the basis of now all my obligation to him certainly had been wiped out and that I could then sustain the position of the classified manager, expressed earlier when he was first discharged in 1938 . . . I made inquiry of Mr. Young . . . to ascertain whether or not Mr. Lugoff was doing any better . . . [A. R. 583] the report was that he was not.

Q. I will ask you whether or not union activity of any kind or nature had anything to do with either of those discharges or with Mr. Lugoff's discharge?

A. It did not . . . if Mr. Young had reported to me that Mr. Lugoff's production was good, he would have been kept.

Q. [A. R. 584.] Were the reasons given in the letters of discharge of these two employees, Mr. Schlichter and Mr. Lugoff, the reasons given by the heads of the departments to you? A. The reasons given to the employees were the reasons obtained from the heads of the departments as to why the services of those employees were unsatisfactory. My reasons were, as I say, based upon the decision that the time had come when I was permitted to act."

Following the discharges of Schlichter, Yeaman and Lugoff there were conferences with representatives of the Los Angeles Newspaper Guild in reference thereto. At the conclusion of the conferences, to wit, on April 16,

1940, Mr. Willis Sargent, attorney and representative of the respondent in the conference, wrote the Guild in part as follows [A. R. 587-9]:

“The management and I have had an opportunity of considering each of the matters raised by the Guild and have reached a conclusion with regard to each of them . . . with regard to Leonard Lugoff, I am informed by the management that he was discharged at the end of the 1938 strike; that he applied for reinstatement on the ground that it was unfair for the management to discharge him when he had not gone out on strike while at the same time it took back five strikers whose services it did not need, and that because of his appeal in this regard he was reinstated; that the connection of each of the five persons with the paper had now been terminated; that in the opinion of the management Mr. Lugoff has not been doing as good a job as it believes can, and should be done, in the territory assigned to him; that the management believes that the territory justifies earnings sufficient to cover the minimum guarantee and that an agreement had been reached with Mr. Lugoff that if he did not reach the minimum guarantee he would be dismissed; that Mr. Lugoff’s earnings did not cover the minimum guarantee so that from both this viewpoint, as well as that of his earlier appeal for reinstatement, the management sees no reason for continuing his employment. The management denies that Mr. Lugoff’s dismissal was by reason of any Guild activity on his part, and the request for his reinstatement is denied.”

To sustain any order against respondent the Board must impeach Palmer’s testimony by substantial evidence.

(*National Labor Relations Board v. Union Manufacturing Co.* (C. C. A. 5, 1941), 124 F. (2d) 332.) The Board fails to meet this burden.

When called as a witness by the Board [A. R. 180] Lugoff testified [A. R. 189]:

"I came into Mr. Palmer's office and Mr. Young and Mr. Palmer were seated there. I told Mr. Palmer that I wanted to speak to him about my discharge last Friday and he said for me to go right ahead and tell him all about it . . . I told him that I took up with Mr. Tobin before going on my vacation two weeks previously about my low production, telling him about the contemplated loan and getting Tobin's okay that it was all right to go ahead. I told him that now that I had a \$300.00 debt on my shoulders and no job that I knew that Mr. Palmer himself was not legally responsible but the debt would nevertheless have to be paid and it would never have been incurred if Tobin hadn't told me that my job was okay . . . He thought a minute and he said 'Do you want us to pay *that* \$300.00 or do you want your job back?' I said naturally I had to work . . . [A. R. 191.] Mr. Palmer said nothing to me but 'Do you want your job back or do you want us to take over *the* \$300.00 loan?' . . . ✕ . . . ✕

There was no statement about the strike settlement agreement at all. 1)

On cross-examination, Lugoff testified [A. R. 273]:

"I spoke to Mr. Tobin about the low production before I went on my vacation . . . I said, 'Mr. Tobin, I am contemplating making a loan. I have to send my wife back East. It isn't imperative but

we think it is necessary. I know my production is low and I think it is mainly due to the strike conditions . . . I need \$300.00 on this loan and if there is any possibility that you are going to fire me because of low production . . . [A. R. 274] let me know and I won't make the loan.' Mr. Tobin said, 'There is nothing to worry about. Go ahead and make the loan.'

Q. Did you make *the* loan through the credit union in the Citizen-News? A. No . . . I made *it* through the Bank of America."

After Mr. Tobin returned from his vacation, according to Lugoff [A. R. 275], Tobin said to him,

"'I am sorry but I will have to let you go. We have taken the strikers back and we have got to cut expenses.' . . . I recalled what he told me two weeks previously and that I had got a \$300.00 loan on my shoulders with no chance of getting a job and he tried to tell me a man of my ability shouldn't have a hard time finding work . . . I said 'Well, you are beating around the bush . . . You promised me that my job was secure. I went out and got a loan and now I am stuck. He said, 'Well, the best thing I can advise you is to go and see Mr. Palmer.' I said, '. . . to hell with it. I wouldn't go over your head anyway . . .' Over the week end my wife had already been sent back East, I had *that* loan, *the* loan was spent . . . I got a little cool and started figuring it was to my [A. R. 276] advantage to see whether I could get *that* loan off my shoulders. That was, Mr. Palmer, the main reason I came to see you on account of *that* loan. I was deeply worried about that . . . I don't believe the Guild was brought up as far as Mr. Tobin and myself were concerned. It was a conversation

about the promise of having a job after I got *that* \$300.00 loan . . . [A. R. 279.] I said, 'Mr. Palmer, I have been fired by Mr. Tobin last Friday and I would like to speak to you about that firing . . . At the time of the strike I was a member of the Guild but gave up my card . . . [A. R. 280.] Now, I have got a \$300.00 loan on my shoulders with no job . . . I know there is no legal reason why you should be made to pay *that* loan but I am in a position where I don't know how I am going to pay it back . . . I merely suggested there was a moral obligation . . . ' [A. R. 283.] I was . . . mainly interested in trying to protect that \$300.00.

Q. [A. R. 338.] This loan of \$300.00 that you said you had obtained, was that a loan on your car?

A. I think it was, yes."

Following Lugoff's testimony that he had secured this loan of \$300.00 on his car from the Bank of America, respondent called as a witness Harry A. Haas [A. R. 550], an employee of the Bank of America, Hollywood main office, 6331 Hollywood Boulevard, who brought with him, in response to a subpoena, the bank records pertaining to loans made by Leonard Lugoff during the year 1938. Mr. Sokol, the Board attorney, thereupon offered to stipulate [A. R. 551] "that on July 27, 1938 Mr. Leonard Lugoff made a loan from the Bank of America in the total sum of \$165.00; that in addition to that loan on that date there was outstanding from a previous loan the sum of \$32.50." Witness Haas thereupon testified that the date of the previous loan was June 18, 1938 [A. R. 552] in the sum of \$45.00. The \$165.00 was loaned with an automobile as security. The earlier \$45.00

loan [A. R. 553] was an unsecured loan. The balance on the June \$45.00 loan was paid [A. R. 554] on August 19, 1938, a few days after obtaining the larger loan, the final payment being \$25.00.

Immediately upon the conclusion of the testimony of Mr. Haas, Mr. Sokol, the Board attorney, stated [A. R. 554-5]:

"I think there has been an implication left in the record, in that Mr. Lugoff testified that he got \$300.00 from the Bank of America, and I can put Mr. Lugoff on on this phase of it if you desire."

Mr. Lugoff, recalled by Mr. Sokol [A. R. 593] was asked by Mr. Sokol:

"Q. Can you explain the facts that the records of the bank show that you only borrowed \$165.00 from the bank? A. Yes. The bank—my wife and I talked it over, and the bank limited me in the first place to a sum around that amount, and we borrowed the amount from the bank that we could straighten up with them inside of a year, then we went outside, from the family, and got the rest. I might add at this time that it was a sick sister in New York that had suddenly developed cancer; and it was partly the family affair . . .

Q. [A. R. 594.] Did you tell the company you borrowed \$300 from the bank? A. I didn't mean to give that interpretation. I meant I incurred an indebtedness of \$300."

[A. R. 596.] Cross-examination of Lugoff:

"Q. From whom did you borrow the difference between \$165 and the \$300, Mr. Lugoff? A. From my brother-in-law.

Q. How much did you get from him? A. \$150.

Q. Did you get that by check? A. I don't know I don't believe so—my wife got it . . .

Q. Your wife got it from Harry Gold? A. That's correct.

Q. Is he her brother? A. He is her brother.

Q. Was the money deposited in any bank account?

A. No, she took it to New York with her.

Q. Was the money obtained from the Bank of America deposited in any bank account? A. No."

Note that the Board introduced this testimony at the close of the case. Note that Lugoff got \$45.00 prior to the time he claims he asked Tobin about the security of his job, and that after he paid off \$32.50 from this \$45.00 loan of June 18, he had \$132.50 net and this is without reference to the amount it took to pay off the balance of any previous loan on his car, but he says he told Palmer there was "a moral obligation" to pay "that \$300.00 loan."

Regardless of the efforts of Mr. Lugoff and the Board's attorney to remove what the Board's attorney said was an "implication left in the record that Mr. Lugoff had borrowed \$300.00 from the Bank of America," we contend that the explanation does not remove the implication, because, until the representative of the bank was produced in court, Mr. Lugoff's testimony was direct and unequivocal that he had borrowed \$300.00 from the bank against his automobile as security. Repeatedly throughout his testimony, prior to the appearance of the bank's representative, Mr. Lugoff referred to "this loan," "that loan," "a loan," "a \$300.00 loan," "the \$300.00 loan," "that \$300.00 loan," "this \$300.00 loan."

If Lugoff told his employer there was “a moral obligation” for the employer to pay “that \$300.00 loan” Lugoff knew that he had obtained only \$165.00 from the bank, less the \$32.50 due on the prior unsecured loan, which was paid off immediately following his obtaining the loan on the car, and less whatever sum was necessary to pay off any balance of the previous loan on the car.

In his endeavor to explain that which the Board’s attorney referred to as “an implication,” Lugoff said that he did not borrow any additional funds but that his wife borrowed additional funds from her own brother in order to visit her sister who was also her brother’s sister who had suddenly become sick with cancer in the East.

Would any member of this Court be willing to employ Mr. Lugoff in a representative capacity?

The Board refers to a statement in the answer of respondent to the effect that Lugoff was reinstated in 1938 [A. R. 96]: “On the same ground as the other employees who were reinstated pursuant to the strike settlement agreement.” The Board implies that there was testimony to this effect and repeats this reference many times throughout its findings. There was no such testimony. The fact that the Board found it necessary to set up a straw man by repeatedly resorting to a statement in the answer and to disregard the evidence, demonstrates the Board’s own opinion that there was no substantial evidence to support its findings.

The Board states erroneously [A. R. 96] that Palmer testified “in support of respondent’s contention that Lugoff was discharged ‘pursuant to the agreement under which he had been reinstated.’” The evidence clearly shows

that Palmer did not so testify. If a statement in the answer differs from Palmer's testimony, the testimony and not the pleadings govern. We do not admit that the Board could make a case if it were legal for it to ignore the evidence and look at the answer, but certainly it makes no case when the evidence is considered. The Board, it is to be noted, failed in many respects to sustain its own pleadings by the evidence. If the pleadings were to govern there would be no need for trials, findings and appeals to this Court.

The Board in its findings [A. R. 94] refers to the so-called union activities of Lugoff, which it concludes were the cause of Lugoff's dismissal. The Board ignores the fact that there was no testimony whatsoever to the effect that knowledge of Lugoff's alleged activities ever reached Palmer. Tobin admitted only that he heard reports of the circulation of one petition in 1939.

“Q. [A. R. 510.] (By Board's attorney.) When did you first learn of any attempt to organize the classified employees? A. (Tobin) I don't believe I ever did have any definite information that they were trying to organize the department.

Q. What about this petition that Lugoff was circulating? . . . [A. R. 511.] What kind of a petition was it? A. I don't know—I never saw the petition; never even made any inquiry about it.

Q. When did you hear about the petition? A. I don't recall.

Q. Wasn't it just prior to Mr. Lugoff's discharge just a week or two? A. I am quite sure it wasn't . . . It seems to me it was sometime before that . . . several months [A. R. 512] nearer the middle of 1939 than it would the early part of 1940.

The Board ignores Palmer's positive testimony that he had no knowledge of Lugoff's union activities [A. R. 579] that the discharges were made on his sole responsibility [A. R. 583] and that union activities had nothing [A. R. 583] to do with his decision to terminate Lugoff's employment.

The Board says [A. R. 94-95]: "In May he (Lugoff) *openly* circulated a petition authorizing the Guild to represent this group (classified advertising section) of employees."

That word "openly" was used by the Board as part of the foundation for its conclusions of law and its order. An examination of the evidence reveals this finding was wholly unsupported. Lugoff, on his direct examination, as a witness called by the Board, testified [A. R. 195] that in May, 1939 he went around with a petition . . . [A. R. 196] telling different members in classified that they could get the Guild to bargain for them without becoming members of the Guild providing they got a majority in classified to sign a petition. Three people, besides himself, signed the petition, making a total of four names on it. He needed a total of seven names to have a majority.

He testified that he circulated the petition right in the plant, that Tobin was around in the department most of the time, that [A. R. 197] "Tobin came in during the noon hour while I was speaking, talking *privately* to one or two of the employees of the classified." In testifying in reference to the circulation of a third petition [A. R. 228] Lugoff said: "The other petitions were circulated . . . to just a few." "Other petitions" would include,

therefore, the first petition of May, 1939 which the Board found Lugoff "openly" circulated.

On cross-examination Lugoff testified [A. R. 250]: "That from 1934 he was continually harassing Mr. Tobin in reference to compensation and working conditions."

In reference to the first petition Lugoff testified on cross-examination [A. R. 265] that he approached six out of a total of 12 in his department. The Trial Examiner [A. R. 266] informed the Board's attorney that the attorney had brought out on direct examination that Lugoff passed the petition "during working hours within knowledge of the respondent." Whereupon Lugoff stated,

"I would like to make an objection to that statement 'working hours.' I did pass a petition around during the day but it was during the noon hour when we were supposedly at lunch . . . [A. R. 267] there were other times after hours, after five o'clock, that I walked up the street with them and talked about it to them too."

Three of the six people signed and three did not.

"Mr. Tobin, during the lunch hour came in the office, sat down and went out . . . [A. R. 268] when I started circulating the petition, Mr. Tobin was not in but during the circulation he came in. I never circulated it at the time he was there . . . [A. R. 269.] Now, this first petition (the one of May, 1939) I doubt whether Mr. Tobin was in the office when I was circulating it . . . the first petition and that contract I made out following was given to people and was given to them in such a way, for instance, that—you see the people that I contacted

on this first petition and the contract were more afraid of their jobs than I was. There seemed to be a fear in the department that if the management caught them doing anything like that that they would lose their job and on this first petition and the following contract, the petition was left in their hands and I walked away. *There was nobody around. The signatures weren't obtained at the office. They were obtained at lunchtime while we were eating lunch.*"

The Board says: "From the testimony of Tobin, who had admitted hearing 'rumors' of Lugoff's petition we are convinced and find, as did the Trial Examiner, that by May, 1939, the respondent was aware of Lugoff's union activity." From the quotations hereinabove made, it is apparent that the Board's conviction is contradicted by the evidence.

The Board finds that in August, 1939 [A. R. 95]:

"Lugoff engaged in an argument with another employee whom he accused of spreading rumor that the 'management was going to close down the plant if the Guild in its negotiations for a new contract didn't act reasonable.' During this argument George Palmer, son of one of the respondent's owners, interposed and declared, according to Lugoff's testimony, that he 'knew that (the rumor) was a fact and he was willing to gamble on it.' We credit Lugoff's testimony, as did the Trial Examiner."

The Board implies that such evidence, if true, would be substantial, and yet the fact remains that respondent completed the contract with the Guild [Exhibit 17-B, A. R. 609-617] and that during the negotiations [A. R. 315] no such threats were made by the management or

its negotiator and in fact that the negotiator stated that he had no knowledge of any threats being made. Palmer testified [A. R. 575] that he made no statement to the effect that the paper would close down unless the Guild was more reasonable in its demands.

The Board attaches weight to the fact that Lugoff's reinstatement was accompanied by a note, dated August 22, 1938, signed by T. H. Young, business manager, as follows [A. R. 98]: "You will be retained in your present position with final decision on January 1, 1939. The intervening period will be probationary." The Board says, and uses as an argument, "The respondent made no effort to explain why terms of reinstatement opposed to those upon which it [A. R. 99] asserts Lugoff was reinstated should be set forth in the letter."

The testimony of Palmer as to reinstatement and Lugoff's testimony about a \$300.00 loan, went to the "why" of reinstatement—not the terms. The Board is again ignoring the evidence and looking at the pleadings.

The Board concludes [A. R. 99]:

"we find that Lugoff's reinstatement in 1938 was not conditioned on, or connected with, the reinstatement of the other employees or the Board's decision in the earlier case, but instead was conditioned solely upon his satisfactory work during the probationary period established by the letter of August 22, 1938. The respondent's claim that Lugoff was discharged 'pursuant to the agreement under which he was reinstated' must be rejected."

The testimony offered by respondent was that Lugoff was discharged, "pursuant to the agreement," etc. The

Board is again ignoring the evidence and looking at the pleadings. The Board again sets up its straw man to have something to knock down. Respondent bases its claim upon the evidence presented to the Board's Examiner as heretofore set out. Since the Board looks to the pleadings instead of to the evidence, it admits that the evidence does not support its conclusions. The Board also refers to the "conditions" of reinstatement, again ignoring Palmer's and Lugoff's testimony as to the "why" of reinstatement.

The Board says [A. R. 99]:

"The respondent's claim that Lugoff's services were unsatisfactory, like its alternative assertion that Lugoff was discharged 'pursuant to the agreement under which he was reinstated' is not supported by the record."

Note here again in the reference to "alternative assertion" the insistence of the Board to set up the straw man and make a case out of a pleading when the evidence gives it no ground to stand on.

But let us consider the statement that "Respondent's claim that Lugoff's services were unsatisfactory" is not supported by the record. The Board [A. R. 101] notes that Lugoff was not discharged nor notified that he was still on probation after January 1, 1939. The Board ignores the fact that Lugoff averaged in earnings \$25.05 a week for the last 13 weeks prior to January 1, 1939, and that he averaged \$19.72 a week the last 13 weeks before he was discharged in March 30, 1940. [A. R. 175-177.] If the Board does not recognize the province of management then its order to respondent to reinstate

Lugoff amounts to an order to employ him for life regardless of what he might produce.

The Board further ignores the fact that a failure to discharge Lugoff until March 30, 1940, when the Board's decision was reached in the earlier case, supports Palmer's testimony as to his reasons for reinstating Lugoff after the first discharge.

The Board says [A. R. 100]:

"In the normal course of business it was the duty of Tobin and Young to recommend discharges to Palmer and after obtaining his approval, make discharges, such practice was not followed with respect to Lugoff."

In making that statement and drawing an erroneous conclusion therefrom the Board ignores the fact that at the same time that Palmer discharged Lugoff, he discharged Schlichter and Yeaman; ignores the fact that the Board found the discharge of Schlichter to have been lawful; and ignores the fact that the Board did not even file charges against respondent for the discharge of Yeaman.

Called as a witness for the Board, Palmer explained why he did the discharging [A. R. 159]:

"Q. What I am trying to ascertain is whether in the discharge of Mr. Schlichter and Mr. Lugoff yours was a secondary interest? . . . A. Well, no. Mine was the primary interest.

Q. Why? A. Well, because I had been the one who had been the leader or at least carrying the brunt of the N. L. R. B. activities as I related, and I was the logical one to give the decision . . ."

It was logical that Palmer would make all three discharges and not ask Tobin to make one, Young to make one and Swisher to make one. Palmer testified [A. R. 583] that he asked Young to inform him whether or not Lugoff was doing any better, and that on being informed that he was not, Palmer terminated Lugoff's services at the same time that he terminated the others. Palmer, it must be kept in mind, reinstated Lugoff after Tobin had discharged him. It was therefore more logical that Palmer should order the subsequent firing of Lugoff than that Tobin should do it. There was no going over anyone's head in that second discharge. It was logical that Palmer do the discharging of Yeaman and Schlichter because their cases were involved in a N. L. R. B. matter and the responsibility rightly should have been taken by Palmer.

The Board states as a finding of fact [A. R. 101]: "Nor was Palmer able to cite a single complaint he had received concerning Lugoff's work during the period of his reinstatement." Let's examine Palmer's testimony when called as a witness by the Board. [A. R. 152]: He did not consider it important to find out how much money he was making on Mr. Lugoff's services,

"as long as I believed that someone else could do better than Lugoff . . . I thought most anybody could . . . who would work hard. Mr. Lugoff in my opinion is lazy and I thought that most anybody who was enterprising could produce more than he . . . [A. R. 153.] I have seen him sleeping in his car parked along the street there in the afternoon . . . As a matter of fact I think Mr. Lugoff before his discharge was regularly loafing in the afternoon . . .

Q. [A. R. 155.] Had you ever complained about Mr. Lugoff? . . . A. No, I didn't have to. Others would complain to me.

Q. Who complained to you? A. Mr. Tobin, Mr. Young."

Tobin testified that he frequently saw Lugoff playing marble games in a barber shop during business hours. [A. R. 526-527; 540.] Palmer asked for a statement from Young as to whether Lugoff's work was satisfactory and received the answer that it was not. [A. R. 583.]

The Board says [A. R. 101]:

"the production records, which admittedly were prepared after Lugoff's [A. R. 102] discharge, are not conclusive. More significant, in our judgment, is the fact that although Tobin and Young were fully aware of the nature of Lugoff's work for a period of 19 months they did not see fit to recommend his discharge."

Let us consider the Board's statement that the figures of Mr. Lugoff's production are not conclusive. The Board means to say that in its judgment Lugoff was producing for his employer all that he should have produced. The Board has neither knowledge, experience, nor competency to substitute its judgment for the judgment of the management. In giving weight to the fact that the production records were prepared after Lugoff's discharge, the Board completely ignores the fact that the Board's Exhibits 6A-6B and 6C [A. R. 174-176] were records asked for by the Board's attorney [A. R. 203; 349] and that those records were compiled from records

kept currently by the respondent. The Board overlooks the fact that Lugoff testified [A. R. 211] that his "lineage had increased steadily from December on until March, 1940." Following his testimony and to show its falsity and to impeach the witness, Tobin testified from the records for which the Board had asked [A. R. 457-458], that whereas Lugoff's average weekly earnings between January 1, 1940 and March 28, 1940 were only \$19.72, he averaged \$21.41 between July 1, 1939 and December 28, 1939, and that as to lineage Lugoff produced during that period when he said he was steadily increasing, to wit: January 1, 1940 to March 28, 1940, a weekly average of 567 lines against a weekly average of 646 lines for the period July 1, 1939 to December 28, 1939. The Board cannot deny these figures but states that they are inconclusive. They are certainly conclusive (1) that Lugoff's production was not steadily increasing as he testified, and (2) that Young correctly informed Palmer that Lugoff was not doing better. We again call attention to the fact that the records [A. R. 175-177] reveal that the last 13 weeks before January 1, 1939, when Lugoff was on trial, Lugoff's average weekly earnings were \$25.05, while the 13 weeks prior to his discharge his weekly earnings averaged \$19.72. The Board's Exhibits 6A-6C [A. R. 174-176] also reveal that prior to Lugoff's receipt of a \$24.00 a week guarantee in July, 1939, Lugoff produced more business and thereby earned more money than he did after the receipt of the guarantee. Those exhibits reveal that during the first 13 weeks of 1939, before the receipt of the guarantee of \$24.00 a week, Lugoff's average earnings were \$22.68. During the corresponding 13 weeks of 1940, Lugoff's average

earnings were \$19.72. These records afford substantial, concrete and uncontradicted evidence that Lugoff should have been discharged. Naturally, until Palmer asked for their recommendation, neither Tobin nor Young would recommend Lugoff's discharge to Palmer in the face of the fact that Palmer had taken the responsibility for reinstatement after Tobin had discharged him.

The Board attaches weight to the fact that Lugoff, among four sales persons, was second high producer. The Board ignores the testimony of the classified advertising manager that Lugoff had the best territory [A. R. 481]:

“there was much more potential advertising in that territory . . . that fact was borne out each week [A. R. 482] by the number of leads he would get from the other papers in his territory . . .”

The Board attempts to explain the evidence that Lugoff on a comparative basis was making a poorer showing than the three other outside sales persons by saying that Lugoff lost three accounts. Lugoff admitted [A. R. 598] that selling classified advertising constantly involved “driving for new business” to get new accounts to offset lost accounts.

The analysis on the comparative basis was made by Harry R. Ringwald [A. R. 470], auditor for respondent, who testified that the total classified lineage of the paper for 1939 was 16.1 per cent less than that of 1937 and that of this total lineage, Reid's loss was only 6.9 per cent, Allen's loss was 30 per cent, McKellar's loss was 10.2 per cent and Lugoff's loss was 35.7 per cent.

The Board holds [A. R. 102] that more significant than the production records of Mr. Lugoff "is the fact that although Tobin and Young were fully aware of the nature of Lugoff's work for a period of 19 months, they did not see fit to recommend his discharge." The strike settlement agreement was signed on July 30, 1938. [A. R. 17-21.] Lugoff was discharged and reinstated about August 9, 1938. Palmer had over-ridden Tobin's previous discharge and taken the responsibility for Lugoff's case. The fact that either Tobin or Young recommended Lugoff's discharge until questioned by Palmer is evidence that they understood the reasons for Lugoff's reinstatement, that they understood the matter was awaiting the outcome of the N. L. R. B. case. The fact that they did not ask for Lugoff's discharge when the records clearly showed he was entitled to discharge supports Palmer's explanation of why he reinstated Lugoff.

The Board [A. R. 102], in its further attempts to substitute its judgment for the management's judgment makes light of the fact that Sellers, an inexperienced office boy, stepped into Lugoff's job and immediately did a better job than Lugoff had been doing. But this cannot be disregarded in judging Lugoff's fitness for employment. The progress that has since been made by Sellers as contrasted to the lack of progress by Lugoff, sustains the management's judgment and proves the incompetency of the Board as a manager.

The Board [A. R. 103] attaches weight, in support of its conclusions, to the fact that Sellers received the same minimum guarantee that Lugoff received. Since a minimum guarantee of \$24.00 had been set up for the

department, there was nothing to do when it was decided to keep him in the job but to pay Sellers the same minimum that had been paid to Lugoff and certainly it could be paid to Sellers more cheerfully than it could be paid to Lugoff because Sellers produced more business than Lugoff did for respondent.

The Board finds [A. R. 103] that "Respondent also asserts that Lugoff was discharged because his commissions failed to cover his guaranteed weekly minimum salary." The Board again ignores Palmer's testimony and misinterprets respondent's Exhibit 16. [A. R. 589.] When the Guild representatives asked for the reinstatement of Mr. Lugoff after his final discharge in 1940 the respondent's attorney advised the Guild [Respondent's Exhibit 16, A. R. 589] that one of the reasons why the management would not reinstate Lugoff was because: "the management believes that the territory justifies earnings sufficient to cover the minimum guarantee."

The Board [A. R. 103] comments on the testimony as to Lugoff's sleeping on the job, failure to call on prospective clients when requested to, and playing marble games during working hours. The Board says:

"The events in question occurred sometime before Lugoff's discharge and were either known to Tobin and Young at the time they considered his record and decided it did not merit discharge, or were not known until after Lugoff's discharge in March, 1940."

We call attention to the absence of testimony that Tobin and Young ever decided Lugoff's record "did not merit discharge." We call attention to Palmer's testimony that

when he asked Young if Lugoff was doing any better Young informed him that he was not. If Palmer had not taken responsibility for Lugoff, Lugoff would not have been working at the time.

The Board says [A. R. 104]: that Palmer's explanation for his discharge of Lugoff "would be applicable had Lugoff been reinstated on the same terms as employees reinstated under the strike settlement agreement." We have previously called attention to the Board's disregard of the evidence and its attempt to build a case on a statement in the answer. If the Board had not ignored the testimony of Palmer, the Board would have said that "Palmer's explanation of why he made the discharges was entirely consistent with Palmer's testimony as to why he reinstated Mr. Lugoff in 1938."

The Board says [A. R. 104]:

"Lugoff was most active in organizing the respondent's unorganized employees and at the very time of his discharge was engaged in circulating a petition to that end."

We have previously commented upon the first petition which Lugoff said he circulated in 1938 to 6 of 12 employees in the Citizen-News and on which he obtained three signatures. Let us call attention further to the testimony of Lugoff [A. R. 259] that prior to the strike in 1938 three out of four of the classified employees were members of the Guild. And if respondent was not disturbed by that condition, certainly it was not disturbed, if it knew, that Lugoff had obtained three signatures including that of Helen Brichoux Kavalosky [A. R. 260], who was an active Guild member. Brichoux was still employed by respondent at the time of the hearing. [A. R. 260.]

Lugoff's circulating of a second petition some months after the first in which he called attention to a Guild contract with the Los Angeles Herald Express produced no different results, according to his testimony. [A. R. 308.] He circulated it among 6 persons and got 3 signatures.

About March 15, 1940, according to Lugoff [A. R. 329], he showed a third petition (Board's Exhibit 19). He obtained no signatures in the two weeks prior to his discharge. [A. R. 330.] This petition he said he showed to Whitebrook, Davis, Brichoux, Bovee and Allen. [A. R. 228.] Florence Davis, head of the 'phone room, said a petition like that would go over good. [A. R. 229-30.] The petition reads as follows. [A. R. 227]:

"We, the undersigned, consisting of a constituted majority of workers of the Classified Department of the Hollywood Citizen News, believing, as the management has stated from time to time, that all workers of all departments in the Citizen News are entitled to the Rights and Privileges obtained by the Editorial department in its contract with the management, and, taking the management at its word when it further states that they the Citizen News, although believing that all the workers of all departments are entitled to these Rights and Privileges, will not bind themselves in any way to recognize such Rights and Privileges until the time that such departments do obtain a majority of workers in their respective departments and do then petition a bargaining agent under the National Labor Relations Act.

"Therefore we do hereby petition the Los Angeles Newspaper Guild to act as the bargaining agent of the Classified Department of the Citizen News and do authorize them to obtain written commitment of such Rights and Privileges in a separate contract.

"Signed:—"

The contents of that petition reveal that if the management had known about its circulation and contents, the management certainly would not have been disturbed. The contents of the petition not only reveal that its circulation could not have been the cause of Lugoff's dismissal but they also reveal the falsity of the Board's ruling that the respondent was interfering, restraining and coercing its employees in the exercise of their rights under the National Labor Relations Act. That petition establishes that the respondent had made it clear to its employees that they were entitled to all the privileges of the National Labor Relations Act.

Further, it should be noted that Patricia Killoran, head of the Citizen-News Unit of the Los Angeles Newspaper Guild [A. R. 378], prepared the petitions for Mr. Lugoff, that [A. R. 380; 390] she was active in many ways in promoting membership in the Guild, that whatever Mr. Lugoff did he did at her instance and direction, and that Miss Killoran was still in the employ of the respondent at the time of the hearing on this matter and had been so employed for 12 years [A. R. 350], that she had been through the strike [A. R. 375], that she had directed a campaign to induce advertisers to withdraw advertising from the newspaper, that [A. R. 374] she had worn a placard while parading in front of Hollywood business houses which read: "Judge Palmer Law Violator," that [A. R. 388] she had plainly and emphatically told Mr. Young that [A. R. 356] she could talk about unions to any extent she pleased, when Mr. Young told her that he could not talk about such matters. Helen Brichoux Kavalosky, a fellow employee of Lugoff's in the classified department [A. R. 260], a member of the

Guild before the strike, a participant in the strike, joined with Lugoff in signing his petitions. She has not been discharged.

The testimony of Lugoff indicates clearly that his union activities did not in the least disturb the management. His laziness [A. R. 499], his failure to make calls [A. R. 507] and his lack of diligence and production did disturb the management.

When Lugoff was discharged in 1940 he was paid severance pay [A. R. 333] according to the schedules set forth in the Guild contracts covering the editorial employees. [Respondent's Exhibits 17-A, 17-B, 17-C, A. R. 603; 612; 622.] The amount was approximately \$200.00 [A. R. 281.] No offer to return the same has been made. [A. R. 282.]

Acceptance of that money by Lugoff was acceptance of his discharge. The two were tied together. If he did not intend to accept his discharge he had no right to accept the money paid in consideration of the discharge. He did not later discover anything that vitiated his contract of acceptance when he accepted the severance money. But if he had discovered anything the obligation rested upon him to tender the return of the \$200.00 before seeking to set aside the discharge.

The National Labor Relations Act does not set aside the law of contracts. Whatever rights the Act guaranteed to Lugoff did not include the right to have his cake and eat it too. He cannot contend that his discharge was unlawful and at the same time accept the compensation that is incidental to a lawful discharge.

POINT III.

The Board's Orders Are Not Valid or Proper Under the Act.

Since respondent is neither engaged in inter-state commerce, in that its operations do not have or tend to have a close, intimate, or substantial relation to trade, traffic or commerce among the several states and do not constitute or tend to constitute a burden, hindrance, obstruction or interference upon or with such commerce, or the free flow thereof, nor does a labor dispute in respondent's plant or operations constitute or tend to constitute such a burden, hindrance, obstruction or interference upon or with such commerce, or the free flow thereof, it follows that respondent is not within the jurisdiction of the National Labor Relations Act or the National Labor Relations Board and that the two purported and alleged orders of the Board pertaining to respondent's business and operations are null and void for want of jurisdiction in the premises.

Further with regard to case No. 9994, the order of the Board is also invalid, illegal and wholly unenforceable in that the purported findings of the Board as to alleged unfair labor practices are not supported by or based upon creditable or substantial evidence, but on the contrary are merely unsupported inferences, conjectures, innuendoes and speculations indulged in by the Board in an effort to sustain its findings and order, and that the record is devoid of any evidence showing or tending to show that any of the purported acts or conduct of respondent alleged by the Board to have been done or engaged in by respondent, in any wise interfered with,

or in the internal affairs of, the Guild, or constituted refusal to bargain collectively with it on behalf of respondent's employees, or constituted illegal conduct during bargaining negotiations with the Guild, or interfered with or tended to interfere with the rights of respondent's employees, or otherwise constituted a violation of any of the rights or privileges of respondent's employees under the said Act or otherwise; and that on the contrary the record shows that respondent did bargain collectively each year with the Guild and entered each year into collective bargaining agreements with the Guild, on behalf of respondent's employees, that respondent's employees were permitted full and complete latitude in the exercise of their rights and privileges under the Act, that respondent's employees did freely engage in union activities without interference or discrimination by respondent, and that such expressions by respondent or its officers, agents or employees alleged by the Board to be illegal and in violation of the Act not only did not restrain either the Guild or respondent's employees, but constituted the exercise of free speech under the Constitution of the United States, as interpreted by the Supreme Court thereof.

Further with regard to case No. 9995, the order of the Board is also invalid, illegal and wholly unenforceable in that the purported finding of the Board that respondent discriminatively discharged Leonard Lugoff is not supported by or based upon creditable or substantial evidence, but on the contrary is contradictory to positive testimony, (1) that Lugoff was reinstated on a plea by him that he should be given equal consideration with strikers who were temporarily reemployed pend-

ing a decision by the Board, (2) that Palmer accepted the decision by the Board as the occasion for the discharge of Lugoff as well as the two other remaining reinstated employees, Schlichter and Yeaman, only after ascertaining that Lugoff's production had decreased and become unsatisfactory for the period immediately preceding his discharge, (3) that Lugoff's discharge by Palmer was consistent with the position taken throughout by Palmer and was made by Palmer without knowledge of Lugoff's prior union activities which, had they been known, were clearly within the scope of activities permitted and avowedly approved by Palmer and respondent as shown by uncontradicted evidence, (4) that upon his discharge Lugoff accepted and retained without objection by him substantial severance pay as set forth in the then existing agreement between respondent and the Guild to be paid in the event of such a discharge, and (5) that the record further shows that there were other uncontradicted acts and conduct by Lugoff justifying his dismissal at the time of his discharge. See *Burlington Dyeing & Finishing Co. v. National Labor Relations Board*, 104 F. (2d) 736 (1939), where a similar discharge took place under facts and circumstances somewhat paralleling those in this case, except that there the officers of the company were shown to have been opposed to labor unions, as was not the case with Palmer. Also see *Kansas City Power & Light Co. v. National Labor Relations Board*, 111 F. (2d) 340 (1940), where the court held that even where there was opposition to the Union, which is denied in the case at bar, and discharges of union members occurred, said discharges alone are not sufficient to justify a finding of an unfair labor prac-

tice under the Act unless said discharge was motivated by such opposition, which it is submitted was not shown by the record in the case at bar. Furthermore the presumption of the law is that the employer has not violated the law by the discharge of a union member, and the burden of proof is not upon the employer but on the one who asserts the fact to prove the discharge was made because of union activities. Where the Board has failed, as here, to meet the burden of proof, the petition to enforce the order must be denied. (*National Labor Relations Board v. Union Manufacturing Co.* (C. C. A. 5, 1941) 124 F. (2d) 332.)

Conclusion.

It is respectfully submitted that the Board's findings are not supported by substantial evidence, that its purported orders are not valid or proper, and that a decree should issue dismissing the Board's petitions for enforcement of its purported orders, as being beyond and without its jurisdiction, and otherwise illegal and invalid by reason of the premises.

HARLAN G. PALMER,

WILLIS SARGENT,

Attorneys for Respondent.

April 1942.

Nos. 9994 and 9995

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE CITIZEN-NEWS COMPANY, A CORPORATION,
RESPONDENT

ON PETITION FOR ENFORCEMENT OF ORDERS OF THE NATIONAL
LABOR RELATIONS BOARD

PETITION OF THE NATIONAL LABOR RELATIONS
BOARD FOR REHEARING

FILED

MAY 3 - 1943

PAUL P. O'BRIEN,
CLERK

In the United States Circuit Court of Appeals for the Ninth Circuit

Nos. 9994 AND 9995

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE CITIZEN-NEWS COMPANY, A CORPORATION,
RESPONDENT

*ON PETITION FOR ENFORCEMENT OF ORDERS OF THE NATIONAL
LABOR RELATIONS BOARD*

PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING

To the honorable, THE JUDGES OF THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:

Comes now the National Labor Relations Board, petitioner herein, and respectfully petitions this Court for a rehearing in the above-entitled causes. In support of its petition, the Board respectfully shows as follows:

On April 2, 1943, the Court, with one member dissenting, handed down its opinions setting aside the Board's orders.

We respectfully submit that the Court erred (1) in failing to give finality to inferences of the Board which were supported by substantial evidence, as required by Section 10 (e) of the Act and numerous decisions

of the Supreme Court; (2) in holding that the Board's decisions conflicted in part with the decision of the Supreme Court in *N. L. R. B. v. Virginia Electric & Power Co.*, 314 U. S. 469; (3) in attaching significance to the asserted fact that respondent had desisted from some of its unfair labor practices prior to the issuance of the complaints herein; and (4) in attaching significance to the asserted fact that some of the Board's findings were not supported by appropriate allegations in the complaints.

I

In holding that there was no substantial evidence to support the Board's findings in this case, the Court has for the most part accepted the Board's subsidiary findings, which are firmly grounded in the record, but has rejected the inferences drawn by the Board, substituting therefor its own inferences. We submit that the Board's inferences were entirely reasonable and that in rejecting them the Court has radically departed from its proper function under the statutory scheme. The Supreme Court has "repeatedly held that Congress, by providing, in § 10 (c), (e), and (f) of the National Labor Relations Act, that the Board's findings 'as to facts, if supported by evidence shall be conclusive,' precludes the courts from weighing evidence in reviewing the Board's orders, and if the findings of the Board are supported by evidence the courts are not free to set them aside even though the Board could have drawn different inferences." *N. L. R. B. v. Nevada Consolidated Copper Corp.*, 316 U. S. 105, 106-107; *N. L. R. B. v. Waterman Steamship*

Corp., 309 U. S. 206, 208–209; *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 597; *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *N. L. R. B. v. Falk Corp.*, 308 U. S. 343; *N. L. R. B. v. Automotive Maintenance Machinery Co.*, 315 U. S. 282.

In Case No. 9994, the Board held that in 1937, respondent called into existence and dealt with committees of its employees in various departments, “in order to head off the organizational campaign of the Guild” (A. R. 133).¹ The Court treats this incident as collective bargaining on the part of respondent *with the Guild*. It thus rejects the Board’s entirely reasonable inference that respondent’s conduct at this point was the direct antithesis of bargaining with the Guild and constituted in fact an effort to avoid the necessity of engaging in such bargaining.

The Board’s inferences with respect to the incidents involving Saturday work, the deprivation of by-lines, and other acts of reprisal against the Guild and its members, all of which were rejected by the Court, were, we submit, fully supported by the record. As to many of these incidents, the Court gave weight to certain factors which are totally immaterial, such as that the Guild was completely organized at the time of respondent’s various attempts to disrupt its activities. Coercive conduct on the part of an employer is just as illegal when aimed at obliterating labor organizations which employees have already established as when aimed at preventing such establishment in the

¹ As in our main brief, references to the record in No. 9994 are designated by the symbol “A. R.”; those in No. 9995 by the symbol “R.”

first place. "The right of collective bargaining is * * * a continuing right" and "the Act guarantees to employees the continuous right to maintain labor organizations for the purposes of collective bargaining," even after a union has been organized and has entered into a contract with the employer. *N. L. R. B. v. Newark Morning Ledger Co.*, 130 F. (2d) 266, 267 (C. C. A. 3).

In setting aside the Board's finding that respondent discriminatorily discharged Lugoff, the Court, we submit, rejected an entirely reasonable inference of the Board. That inference was well supported, on the one hand, by the fact that Lugoff was the active leader of organization efforts in the classified advertising department, and, on the other hand, by the fact that the reasons assigned by respondent for the discharge were inconsistent and unsupported by the record, and hence, as the Board found, spurious. Neither of these considerations was mentioned by the Court, although it is well settled that the assignment of clearly false reasons for a discharge, of itself, lends potent support to a finding of illegal motive. *N. L. R. B. v. Bradford Dyeing Ass'n*, 310 U. S. 318, 330-332; *N. L. R. B. v. Blanton Co.*, 121 F. (2d) 564, 570 (C. C. A. 8); *N. L. R. B. v. Burk Bros.*, 117 F. (2d) 686, 687 (C. C. A. 3); *Gamble-Robinson Co. v. N. L. R. B.*, 129 F. (2d) 588, 593 (C. C. A. 8); *N. L. R. B. v. Condenser Corp.*, 128 F. (2d) 67, 75 (C. C. A. 3); *N. L. R. B. v. Willard, Inc.*, 98 F. (2d) 244 (App. D. C.). The Court went further, however. It stated as a fact that "in seeking reemployment by the respondent Lugoff contended that he should not be worse

off than the strikers who had been returned to employment." This statement rests solely on the testimony of Palmer concerning his conversation with Lugoff at the time the latter applied for reinstatement in August 1938. Lugoff's testimony concerning this incident conflicted with that of Palmer, as we have shown in our brief (pp. 21, 25-26), and the Board expressly accepted Lugoff's version of the incident (R. 98-99). The impropriety of the Court's action in this connection is clear.

II

We submit that the Court erred in holding that certain portions of the Board's findings in the instant case conflicted with the decision of the Supreme Court in *N. L. R. B. v. Virginia Electric & Power Co.*, 314 U. S. 469. In that case, an employer had expressed views concerning the labor activities of its employees, without voicing actual threats or warnings that it would use its economic power to interfere with or control their activities. The Court held that a finding that such expressions, standing by themselves and separated from their background, were illegal was of doubtful validity. The Court was careful to point out, however, that "in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways" (314 U. S., at p. 477). Moreover, the Court reaffirmed its earlier holding in *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 78 that "slight suggestions as to the employer's choice between unions may have

telling effect among men who know the consequences of incurring that employer's strong displeasure."

The Circuit Courts generally have recognized that the *Virginia Electric* decision does not preclude the Board from finding that an employer has violated the Act through "pressure exerted vocally." Such a contention was rejected by the Circuit Court of Appeals for the Seventh Circuit, in *N. L. R. B. v. Stone*, 125 F. (2d) 752, cert. den. 63 S. Ct. 44, where the Court stated (at pp. 755-756):

We do not think it necessary, however, to discuss or decide the validity of the Board's conclusion with reference to these separate incidents [of interference, restraint, and coercion], because of the Board's general finding predicated upon events as a whole. In such a situation, the rationale of the *Virginia Electric & Power Company* case, as we understand it, has no application.

Accord: *N. L. R. B. v. Schaefer-Hitchcock Co.*, 131 F. (2d) 1004, 1007-1008 (C. C. A. 9); *N. L. R. B. v. M. A. Hanna Co.*, 125 F. (2d) 786, 790 (C. C. A. 6), and *N. L. R. B. v. Baldwin Locomotive Works*, 128 F. (2d) 39, 50 (C. C. A. 3), where the Court noted that "One's due accountability for the effect of his expressions is not a limitation upon his right to speak freely" (citing the *Virginia Electric & Power* case). Contrary contentions made by employers in recent petitions for certiorari have not been accepted by the Supreme Court. See *North Electric Mfg. Co. v. N. L. R. B.*, 123 F. (2d) 887 (C. C. A. 6), cert. den. 315 U. S. 818; *Norristown Box Co. v. N. L. R. B.*, 124 F. (2d) 429 (C. C. A. 3),

cert. den. 316 U. S. 667; *N. L. R. B. v. Elkland Leather Co.*, 114 F. (2d) 221 (C. C. A. 3), cert. den. 311 U. S. 705. See also *N. L. R. B. v. Chicago Apparatus Co.*, 116 F. (2d) 753 (C. C. A. 7). Moreover, in the *Virginia Electric Power* case itself, the Circuit Court of Appeals for the Fourth Circuit, after the case was reconsidered by the Board in light of the Supreme Court's decision, upheld the Board's finding that the statements there involved were coercive and hence illegal. (132 F. (2d) 390, 392-395, cert. granted on another point, on March 15, 1943).

The directly coercive nature of many of the acts of respondent's agents here needs no elaboration. Brandon's warning that white collar workers would one day "go out and shoot" union men (Board's brief, p. 8) can hardly be considered as a mere expression of opinion. Similarly, Business Manager Young's statement that Killoran could not be "trusted" was a clear warning that her Guild activities had caused a change to her disadvantage in her status as an employee (Board's brief, p. 20). The same may be said of respondent's frequently voiced warnings that continued adherence to the Guild would result in cuts in wages and even discharges (Board's brief, pp. 13, 15).

Thus "the total activities of [the] employer" (*Virginia Electric* case, 314 U. S. at p. 477) fully justified the Board in finding in Case No. 9994 that—

by the continuing expressions of criticism and disparagement of the Guild, the criticism of the use of outside negotiators, the attempt to secure contracts with employees' committees in the various departments, the threat to cut wages

in the event that the classified-advertising employees failed to sign a contract, and the threat to discharge employees if a contract with the Guild was consummated respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (A. R. 135).

and in making its similar finding in Case No. 9995 (R. 93). In thus considering "the totality of the Company's activities during the period in question" (*Virginia Electric* case, 314 U. S., at p. 477), the Board considered precisely what the Supreme Court held that it had failed to consider in the *Virginia Electric* case.

III

In its opinion, the Court commented on the fact that respondent's discriminatory practices with respect to working on Saturdays (in Case No. 9994) and the deprivation of bylines (in Case No. 9995) had ceased prior to issuance of the Board's order. To the extent that the Court relied on this circumstance in setting aside the Board's order, it was clearly in error. The Supreme Court's decision in *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, is controlling on this point. In that case, the employer had engaged in espionage, but had desisted therefrom prior to the institution of proceedings against it under the Act. The Supreme Court expressly held that that fact did not constitute grounds for ignoring the unfair labor practice which had taken place and that the Board "was entitled to bar its resumption" (305 U. S., at p. 230).

IV

In Case No. 9994, the Court indicated, generally, that none of the Board's findings with respect to Section 8 (1) were supported by allegations in the Board's complaint. Specifically, it noted that no charge was made in the complaint with respect to the action of Brandon in requiring the classified advertising department employees to work on Saturdays. Similarly, in Case No. 9995, the Court noted that the subject of bylines, although dealt with in the Board's decision, was not specifically mentioned in the complaint. We submit that the complaints in these two proceedings were entirely adequate to frame the issues resolved by the Board. In Case No. 9994, the complaint set forth numerous individual acts of interference and coercion on the part of respondent (A. R. 7-8), and alleged that by these acts respondent had refused to bargain collectively in violation of Section 8 (5) of the Act and that "by all said acts, and each of them," respondent had violated Section 8 (1) of the Act (A. R. 8). Clearly, the Board's dismissal of the 8 (5) allegation did not, as the Court implied, require it to dismiss the entirely distinct allegations as to Section 8 (1). In Case No. 9995, the complaint again set forth numerous individual actions constituting illegal restraint and coercion, and alleged that "by these and other acts" respondent had violated Section 8 (1) (R. 5-6). That allegation was entirely sufficient to support the Board's finding with reference to a matter on which evidence was given at the hearing, since no request was made for greater particularization of the complaint and there

was no showing of surprise or lack of opportunity to defend. *N. L. R. B. v. Yale & Towne Mfg. Co.*, 114 F. (2d) 376, 379 (C. C. A. 2). Accord: *N. L. R. B. v. Pacific Gas & Electric Co.*, 118 F. (2d) 780, 788–789 (C. C. A. 9); *N. L. R. B. v. Remington Rand, Inc.*, 94 F. (2d) 862, 873 (C. C. A. 2), cert. den. 304 U. S. 576, 585; *Consumers Powers Co. v. N. L. R. B.*, 113 F. (2d) 38, 41–43 (C. C. A. 6); *N. L. R. B. v. Piqua Munising Wood Products Co.*, 109 F. (2d) 552, 557 (C. C. A. 6); *Fort Wayne Corrugated Paper Co. v. N. L. R. B.*, 111 F. (2d) 869, 873 (C. C. A. 7); *Valley Mould & Iron Corp. v. N. L. R. B.*, 116 F. (2d) 760, 767 (C. C. A. 7), cert. den. 312 U. S. 680.

The Court's reliance on the asserted insufficiency of the complaints was improper for an independent reason. The Supreme Court has recently had occasion, in *Marshall Field & Co. v. N. L. R. B.*, 63 S. Ct. 585, to stress the importance of the "salutary policy adopted by Section 10 (e) affording the Board opportunity to consider on the merits questions to be urged upon review of its order."² With the exception of the matter of by-lines, respondent at no time urged before the Board or the Court that the complaints were insufficient. The question was never raised until the issuance of the Court's decisions herein. In thus raising this question *sua sponte*, at a time when the Board no longer had jurisdiction over the proceeding, the

² Section 10 (e) provides in part that—

"No objection that has not been urged before the Board, its member, agent or agency, *shall be considered* by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." [Italics supplied.]

Court has frustrated the purpose of the provisions of Section 10 (e) referred to above, which is to enable the Board either to supply deficiencies in the record which are called to its attention or, if they cannot be supplied, to dismiss the complaint without further proceedings.

The findings of the Board, under the controlling decisions, are supported by substantial evidence, and its orders based thereon are valid and proper.

WHEREFORE, because of the importance of the questions involved, it is prayed that a rehearing of these cases be granted, and that on such a rehearing the Court grant full enforcement of the Board's orders.

Respectfully submitted.

ROBERT B. WATTS,
General Counsel,

ERNEST A. GROSS,
Associate General Counsel,
National Labor Relations Board.

CERTIFICATE OF COUNSEL

Comes now Robert B. Watts, General Counsel to the National Labor Relations Board, and certifies that he has read and knows the contents of the foregoing petition, and that said petition is filed in good faith and not for purposes of delay, and that he believes it to be meritorious.

/s/ ROBERT B. WATTS.
Robert B. Watts.

WASHINGTON, D. C., May 1943.

NO. 9832

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

BISHOP TRUST COMPANY, LIMITED, Exe-
cutor of the Estate of John A. McCandless,
deceased,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the
United States Board of Tax Appeals

FILED

NOV 1 - 1941

PAUL P. O'BRIEN,

No. 9832

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

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Upon Petition to Review a Decision of the
United States Board of Tax Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

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For Comm'r.:

T. M. MATHER, Esq.,

Docket No. 97943

ESTATE OF JOHN A. McCANDLESS, Dec'd.,
BISHOP TRUST COMPANY, LIMITED,
Executor,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1939

Apr. 11—Petition received and filed. Taxpayer notified. (Fee paid.)

“ 11—Copy of petition served on General Counsel.

“ 11—Request for Circuit hearing in Honolulu filed by taxpayer. 4/11/39 copy served.

May 17—Answer filed by General Counsel.

“ 23—Copy of answer served on taxpayer. Honolulu, Hawaii.

1940

- Jan. 9—Hearing set April 29, 1940 in Honolulu.
May 2—Hearing had before Mr. Smith on merits.
Submitted. Appearance of Milton Cades
and Urban E. Wild filed at hearing. Briefs
due August 1, 1940—Replies Sept. 16,
1940.
May 20—Transcript of hearing of May 2, 1940 filed.
Jul. 15—Brief filed by taxpayer.
Aug. 1—Brief filed by General Counsel.
Sep. 23—Motion for leave to file the attached reply
brief, brief lodged, filed by taxpayer.
9/23/40 granted.
Nov. 27—Opinion rendered, Smith, Div. 5. Deci-
sion will be entered under Rule 50.
Dec. 20—Computation of deficiency filed by General
Counsel.
Dec. 27—Hearing set Feb. 19, 1941 on settlement.

1941

- Jan. 25—Consent to settlement filed by taxpayer.
1/27/41 copy served.
“ 28—Decision entered, Charles P. Smith, Div. 5.
Apr. 19—Petition for review by U. S. Circuit Court
of Appeals, 9th Circuit, and statement of
points filed by General Counsel.
May 13—Proof of service of petition for review and
statement of points filed by General Coun-
sel. (2)
“ 13—Agreed statement of evidence filed.
“ —Agreed praecipe filed [1*]

*Page numbering appearing at top of page of original certified Transcript of Record.

United States Board of Tax Appeals

Docket No. 97943

ESTATE OF JOHN A. McCANDLESS, DE-
CEASED, BISHOP TRUST COMPANY,
LIMITED, Executor,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, symbols IT:FC:LJH-90D, dated February 9, 1939, and as a basis of its proceeding alleges as follows:

I

The petitioner was the duly appointed and acting Executor under the Will and of the Estate of John A. McCandless, deceased, with its principal office and place of business at the corner of King and Bishop Streets, City and County of Honolulu, Territory of Hawaii. [2]

By Order Approving Accounts, Determining Trust and Distributing Estate, of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers in Probate, dated January 21, 1936, Bishop Trust Company, Limited, Executor under

the Will and of the Estate of John A. McCandless, deceased, conveyed, transferred, and delivered on January 22, 1936, to Bishop Trust Company, Limited, the duly appointed and acting Trustee under the Will and of the Estate of John A. McCandless, deceased, the residuary estate of John A. McCandless, deceased, whereupon the Executor, aforesaid, was discharged from its trust as Executor of the Will of John A. McCandless, deceased, subject to the performance of specific acts which have been performed. On January 22, 1936, the Final Receipt of Bishop Trust Company, Limited, Trustee under the Will and of the Estate of John A. McCandless, deceased, acknowledging the distribution to it as such Trustee of all of the assets of every kind and sort remaining in the Estate of John A. McCandless, deceased, pursuant to the order of distribution, aforesaid, was duly filed in the Court, aforesaid.

Bishop Trust Company, Limited, did not inform the Commissioner of Internal Revenue of its discharge as Executor, in the manner provided in section 312 of the Revenue Act of 1934.

II

The notice of deficiency, a copy of which is attached to and made a part of this petition and is marked Exhibit A, was [3] mailed to "Estate of John A. McCandless, Deceased, Bishop Trust Company, Limited, Executor," on February 9, 1939.

III

The tax in controversy is income tax for the taxable year begun February 1, 1935, and ended January 31, 1936, and in the amount of Fifteen Thousand Four Hundred Eight Dollars and thirty-three cents (\$15,408.33).

IV

The determination of income tax set forth in said notice of deficiency is based upon the following errors:

A. The Commissioner of Internal Revenue has erred in including in gross income in the determination of the taxpayer's statutory net income for the taxable year ended January 31, 1936, \$49,111.20, which the taxpayer received during said taxable year from John A. McCandless & Company, Limited, a **domestic corporation**, and which was a distribution of capital;

B. The Commissioner of Internal Revenue has erred in denying as deductions from gross income in the determination of the taxpayer's statutory net income for the taxable year ended January 31, 1936, \$2,925.00 professional fees and \$1,859.35 traveling expenses, which were paid by the taxpayer during said taxable year as ordinary and necessary expenses incurred in carrying on its business;

C. The Commissioner of Internal Revenue has erred in denying as an additional deduction from gross income in the determination of the taxpayer's statutory net income for the [4] taxable year ended January 31, 1936, \$20,504.58, which represents in-

come received by the taxpayer during the taxable year aforesaid that was properly paid during such year to Bishop Trust Company, Limited, Trustee and sole residuary legatee under the Will and of the Estate of John A. McCandless, deceased;

D. The Commissioner of Internal Revenue has erred in determining that there is a deficiency of \$15,408.33 (or of any other amount) in the taxpayer's income tax for the taxable year ended January 31, 1936.

V

The facts upon which the petitioner relies as the basis of this proceeding are as follows:

A. The taxpayer's accounting at all times was on the cash receipts and disbursements basis.

B. Taxpayer's fiscal year was the twelve months' period begun February 1 and ended January 31, and the taxable year involved in this proceeding is the taxable period begun February 1, 1935, and ended January 31, 1936.

C. All of the taxpayer's Federal income-tax returns on Forms 1040 and 1041 conformed to its accounting methods and period, aforesaid, and were filed with the Collector of Internal Revenue for the District of Hawaii, Honolulu, T. H.

Capital Distribution

D. During the taxable year ended January 31, 1936, the taxpayer received from John A. McCandless & Company, Limited, a domestic corporation, distributions which totaled \$49,111.20. [5]

E. The fiscal and taxable year of John A. McCandless & Company, Limited, was and is the calendar year, and the \$49,111.20 distributed to the taxpayer during its taxable year ended January 31, 1936, was the total of a series of distributions made by John A. McCandless & Company, Limited, during the period begun February 1, 1935, and ended December 31, 1935.

F. At no time during the calendar year 1935 did John A. McCandless & Company, Limited, have earnings or profits accumulated after February 28, 1913.

G. The \$49,111.20 aforesaid was a distribution from the capital of John A. McCandless & Company, Limited, made during the period begun February 1, 1935, and ended December 31, 1935.

H. The Commissioner of Internal Revenue included in gross income in the determination of the taxpayer's statutory net income for the taxable year ended January 31, 1936, the \$49,111.20 distribution of capital made by John A. McCandless & Company, Limited, aforesaid.

Business Expenses

I. Throughout the period begun on March 4, 1930, with the issuance of Letters Testamentary, and ended with its discharge, on January 22, 1936, the taxpayer, Bishop Trust Company, Limited, Executor under the Will and of the Estate of John A. McCandless, deceased, was engaged in business.

J. During the fiscal year begun February 1, 1935, and ended January 31, 1936, the taxpayer paid

as ordinary and [6] *and* necessary expenses incurred during said taxable period in carrying on its business, \$2,925.00 in accountant's fees and \$1,859.35 in accountant's traveling expenses.

K. The Commissioner of Internal Revenue denied as deductions from gross income in the determination of the taxpayer's statutory net income for the taxable year ended January 31, 1936, the \$2,925.00 accountant's fees and the \$1,859.35 accountant's traveling expenses, paid as aforesaid.

Distribution to Beneficiary

L. The gross income of the taxpayer for the taxable year ended January 31, 1936, consisted solely of dividends received from domestic corporations; the total amount thereof was \$31,248.09.

M. Included in the residuary estate of the taxpayer which was conveyed, transferred, and delivered, on January 22, 1936, to Bishop Trust Company, Limited, Trustee and sole residuary legatee under the Will and of the Estate of John A. McCandless, deceased, pursuant to an order of court made January 21, 1936, was \$20,504.58 of the \$31,248.09 cash income received by the taxpayer during the taxable year ended January 31, 1936.

N. Of the income of the taxpayer received during the fiscal year ended January 31, 1936, the taxpayer properly paid within the taxable year aforesaid to the sole residuary legatee under the Will and of the Estate of John A. McCandless, deceased, on January 22, 1936, \$20,504.58. [7]

O. The Commissioner of Internal Revenue denied as an additional deduction from gross income in the determination of the taxpayer's statutory net income for the taxable year ended January 31, 1936, the \$20,504.58 aforesaid.

P. Bishop Trust Company, Limited, Trustee and sole residuary legatee under the Will and of the Estate of John A. McCandless, deceased, included in its gross income for the taxable year begun February 1, 1935, and ended January 31, 1936, the \$20,504.58 income properly paid to it on January 22, 1936, by the taxpayer, and duly paid Federal income tax thereon.

VI

Wherefore, the petitioner prays that the Board may hear this proceeding and determine—

A. That the \$49,111.20 received by the taxpayer from John A. McCandless & Company, Limited, during the taxable year ended January 31, 1936, was a distribution of capital and was not taxable income;

B. That the \$2,925.00 accountant's fees and the \$1,859.35 accountant's traveling expenses paid by the taxpayer during the taxable year ended January 31, 1936, were ordinary and necessary expenses incurred in carrying on the taxpayer's business and are deductible from gross income in determining the taxpayer's statutory net income for the taxable year aforesaid;

C. That the \$20,504.58 paid by the taxpayer to the sole residuary legatee during the taxable year

ended January 31, [8] 1936, was income properly paid to said legatee and was a deduction from gross income in determining the taxpayer's statutory net income for said taxable year, and

D. That there is no income tax due from the taxpayer for the fiscal year begun February 1, 1935, and ended January 31, 1936.

(S) E. R. CAMERON

Counsel for Petitioner, 314-19
Bishop Trust Building, P. O.
Box 2906, Honolulu, T. H.

Territory of Hawaii

County of Honolulu—ss.

T. G. Singlehurst, being first duly sworn, says that he is the treasurer of Bishop Trust Company, Limited, the petitioner above-named; that Bishop Trust Company, Limited, was the duly appointed and acting Executor under the Will and of the Estate of John A. McCandless, deceased, and that Bishop Trust Company, Limited, was duly discharged as such Executor prior to the mailing of the deficiency letter of February 9, 1939, addressed to it as Executor; that as treasurer of Bishop Trust Company, Limited, formerly executor under the Will and of the Estate of John A. McCandless, deceased, he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements made therein are true, except as to those statements which are [9] obviously based upon

information and belief and those statements he believes to be true.

(S) T. G. SINGLEHURST

Treasurer, Bishop Trust Company, Limited, formerly Executor under the Will and of the Estate of John A. McCandless, deceased, Honolulu, T. H.

Subscribed and sworn to before me this 30th day of March, A. D., 1939.

(Seal) (S) PHILIP H. LEVEY

Notary Public, First Judicial Circuit, Territory of Hawaii. [10]

EXHIBIT A

Treasury Department
Internal Revenue Service
Honolulu, T. H.

Office of
Internal Revenue Agent in Charge
Honolulu Division
IT:FC:LJH-90D

February 9, 1939.

Estate of John A. McCandless, Deceased,
Bishop Trust Company, Limited, Executor,
King and Bishop Streets,
Honolulu, T. H.

Sirs:

You are advised that the determination of your income tax liability for the taxable year ended Jan-

uary 31, 1936 discloses a deficiency of \$15,408.33 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Honolulu, T. H. for the attention of IT:FC:LJH. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By (Sgd.) H. A. PETERSON

Internal Revenue Agent in
Charge.

Enclosures:

Statement.

Form of waiver. [11]

IT:FC:LJH-90D

STATEMENT

#5053

Estate of John A. McCandless, Deceased, Bishop Trust Company, Limited, Executor, Honolulu, T. H.

Tax Liability for the Taxable Year Ended

January 31, 1936

Income tax

Liability—\$15,408.33.

Assessed—None.

Deficiency—\$15,408.33.

In making this determination of your income tax liability, careful consideration has been given to the reports of examination dated January 31, 1938; to your protest dated March 28, 1938; and to the statements made at the conferences held on April 29, 1938 and November 14, 1938.

From information on file in this office, it appears John A. McCandless died testate on January 30, 1930. The Bishop Trust Company, Ltd., was executor under the will, which, after providing for payment of decedent's just debts and specific bequests, directed that the balance of the estate be turned over to the Bishop Trust Company in trust.

On January 22, 1936, pursuant to the order of the Court, First Judicial Circuit, Territory of Hawaii, filed January 21, 1936, there was turned over to the Bishop Trust Company, Ltd, Trustee, John A. McCandless Trust, \$20,504.58, which was reported as follows on the return filed by you:

“Final return of Estate in administration on January 25, 1936, \$20,504.88 was distributed to

Bishop Trust Company, Ltd., Trustee under the will of John A. McCandless, deceased, by Bishop Trust Company, Ltd., Executor, \$19,423.72 of which has been returned by the Trustee in its returns on form 1041 and form 1040 for the fiscal year ended January 31, 1936."

The cash payment has been disallowed as a deduction in determining your net income as such payment does not constitute an allowable deduction under the provisions of section 162(c) of the Revenue Act of 1934 in computing the net income of the estate.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....	\$	none	
			[12]
Unallowable deductions and additional income:			
(a) Dividends received		80,359.29	
Nontaxable income and additional deductions:			
(b) Capital net loss.....	\$	2,000.00	
(c) Interest paid		356.68	
(d) Taxes paid		401.27	
(e) Other deductions		4,067.15	6,825.10
Net income adjusted.....			\$73,534.19

EXPLANATION OF ADJUSTMENTS

(a) Dividends received as follows:

Pioneer Mill Co., Ltd.....	\$ 7,667.00
Ewa Plantation Co., Ltd.....	1,200.00
Oahu Sugar Co., Ltd.....	7,750.00
Home Insurance Co. of Hawaii, Ltd.	1,800.00
McCandless Building Co., Ltd.....	2,188.80
C. Brewer & Co., Ltd.....	3,888.00
Waialua Agricultural Co., Ltd.....	720.00
Bank of Hawaii.....	1,524.00

Inter-Island Steam Navigation Co., Ltd.	2,380.00
Pacific Gas & Electric Co.....	99.04
Bishop Trust Co., Ltd.....	31.25
J. A. McCandless Co., Ltd.....	49,111.20
Alexander & Baldwin, Ltd.....	2,000.00
	<hr/>
	\$80,359.29

(b) Capital net loss as deducted in form 1041.

(c) Interest paid as deducted in form 1041.

(d) Taxes paid as deducted in form 1041\$ 400.19

Excise tax paid on dividends received from C. Brewer & Co., Ltd. 1.08

\$ 401.27

[13]

(e) Income commissions\$ 4,044.23

Sundry expense 22.92

\$ 4,067.15

COMPUTATION OF TAX

Net income adjusted.....\$73,534.19

Less:

Personal exemption 1,000.00

Balance (surtax net income)..... 72,534.19

Less:

Dividends 80,359.29

Net income subject to normal tax..... None

Surtax on \$72,534.19.....\$15,408.33

Correct income tax liability.....\$15,408.33

Income tax assessed..... None

Deficiency of income tax.....\$15,408.33

[Endorsed]: U. S. B. T. A. Filed April 11, 1939.

[14]

[Title of Board and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

I. Admits the first and last sentences contained in paragraph I of the petition, but, for lack of information, denies the remaining allegations contained in said paragraph.

II. Admits the allegations contained in paragraph II of the petition.

III. Admits the allegations contained in paragraph III of the petition.

IV. A, B, C, D. Denies that the Commissioner erred in the determination of the deficiency as alleged in subparagraphs A to D, inclusive, of paragraph IV of the petition. [15]

V. A to D, inclusive. Admits the allegations contained in subparagraphs A to D, inclusive, of paragraph V of the petition.

E. For lack of information, denies the allegations contained in subparagraph E of paragraph V of the petition.

F. Denies the allegations contained in subparagraph F of paragraph V of the petition.

G. Denies the allegations contained in subparagraph G of paragraph V of the petition.

H. Admits the Commissioner of Internal Revenue included in gross income in the determination

of the taxpayer's statutory net income for the taxable year ended January 31, 1936, the \$49,111.20 distribution made by John A. McCandless & Company, Limited, as alleged in subparagraph H of paragraph V of the petition, but denies the remaining allegations contained in said paragraph.

I. Denies the allegations contained in subparagraph I of paragraph V of the petition.

J. Denies the allegations contained in subparagraph J of paragraph V of the petition.

K. Admits the Commissioner of Internal Revenue denied as deductions from gross income in the determination of the taxpayer's statutory net income for the taxable year ended January 31, 1936, the \$2,925.00 accountant's fees and the \$1,859.35 accountant's traveling expenses, as alleged in subparagraph K of paragraph V of the petition. [16]

L. Denies the allegations contained in subparagraph L of paragraph V of the petition.

M. Admits that included in the residuary estate of the taxpayer which was conveyed, transferred, and delivered, on January 22, 1936, to Bishop Trust Company, Limited, Trustee, under the will and of the estate of John A. McCandless, deceased, pursuant to an order of court made January 21, 1936, was \$20,504.58 cash income received by the taxpayer during the taxable year ended January 31, 1936, as alleged in subparagraph M of paragraph V of the petition, but denies the remaining allegations contained in said paragraph.

N. Denies the allegations contained in subparagraph N of paragraph V of the petition.

O. Admits the allegations contained in subparagraph O of paragraph V of the petition.

P. Denies the allegations contained in subparagraph P of paragraph V of the petition.

VI. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and that the petitioner's appeal be denied.

Signed J. P. WENCHEL

TMM

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,

T. M. MATHER,

Special Attorneys, Bureau of Internal Revenue.

TMM:emb 5-9-39

[Endorsed]: U. S. B. T. A. Filed May 17, 1939.

[17]

[Title of Board and Cause.]

Docket No. 97943. Promulgated November 27, 1940.

1. During the taxable year a portion of the income of the decedent's estate in process of administration or settlement was turned over to the trustee

of a testamentary trust, which returned it, less deductible expense, for income tax. Held, following Estate of Ida A. White, 41 B. T. A. 525, that the amount so turned over to the trustee is a legal deduction from gross income under section 162 (c) of the Revenue Act of 1934.

2. During the taxable year the petitioner paid the fees and traveling expenses of an accountant incurred in adjusting petitioner's income taxes for prior taxable years. Held, that the amounts paid are not legal deductions from gross income.

Urban E. Wild, Esq., Milton Cades, Esq., and E. R. Cameron, C. P. A., for the petitioner.

T. M. Mather, Esq., for the respondent.

OPINION

Smith: This is a proceeding for the redetermination of a deficiency of \$15,408.33 in income tax of the estate of John A. McCandless, deceased, during the period of administration or settlement for the fiscal year ended January 31, 1936. Only a portion of the deficiency is in controversy.

The petitioner alleges that the respondent erred in disallowing the deduction from gross income of (1) \$2,925 professional fees and \$1,859.35 traveling expenses which were paid by the estate during the taxable year as ordinary and necessary expenses incurred in carrying on its business, and (2) \$20,504.58 representing income received by the estate during the taxable year "that was properly paid during such year to Bishop Trust Company, Lim-

ited, Trustee and sole residuary legatee under the Will and of the Estate of John A. McCandless, deceased."

The petitioner, Bishop Trust Co., Ltd., of Honolulu, Territory of Hawaii, was during the taxable year 1936 the duly appointed and [18] acting executor under the will and of the estate of John A. McCandless, who died a resident of Honolulu on January 30, 1930.

The decedent left a large estate. He named the Bishop Trust Co., Ltd., an Hawaiian corporation, as his executor, and also as the testamentary trustee of his residuary estate, and it duly qualified as such. The decedent provided in his will that the executor should pay to his widow \$1,000 per month for support and maintenance during the administration of his estate, the first of such payments to be made one month from the date of his death and succeeding payments in a like amount on the same day of each succeeding month until such time as his residuary estate should be turned over to the testamentary trustee. He also directed that the executor should pay to each of his four grandchildren for support, maintenance, and education during the administration of the estate \$250 per month, the first payment to be made one month from the date of his death and succeeding payments on the same day of each succeeding month until such time as his residuary estate should be turned over to the testamentary trustee. His will further provided:

Eighth. I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal or mixed, wheresoever situated and of every kind or nature, and any property over which I shall possess any power of appointment, to Bishop Trust Company, Limited, an Hawaiian corporation, in trust for the uses and purposes and with the powers as hereinafter stated, * * *

The trustee was directed to "pay and deliver from the accumulations and net income of my said trust estate" \$1,000 per month to his widow, beginning one month from the date of the last monthly payment made to the widow by the executor and continuing until such time as his eldest grandchild should attain the age of 21 years, after which the widow was to receive one-tenth of the annual net income of the trust. The trustee was also directed to "pay and deliver from the accumulations and net income of my said trust estate" \$250 per month to each grandchild. After a grandchild attained the age of 21 years he or she was to receive one-tenth of the annual net income of the trust estate. Surplus income of the trust estate was to be accumulated and invested. When the youngest grandchild attained the age of 30 years the trust was to determine and one-fifth of the trust estate was to be paid over to the widow, if living, and one-fifth to each grandchild per stirpes.

On January 12, 1936, the executor filed a petition in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, sitting in probate, requesting an approval of its first and final account of the administration of the estate and that "an order be made to deliver over such property as remains to the persons thereto entitled, and [19] that petitioner be relieved from all further responsibilities as executor under the will and of the estate of John A. McCandless."

On January 21, 1936, the court, sitting in probate, entered an order reading in part as follows:

It Is Further Ordered, Adjudged and Decreed that Bishop Trust Company, Limited, shall forthwith upon the signing of this Order, convey, transfer and deliver to Bishop Trust Company, Limited, as Trustee under the Will and of the Estate of John A. McCandless, Deceased, the assets remaining in its hands as Executor aforesaid; and that upon the filing herein of due and proper vouchers showing the receipt by Bishop Trust Company, Limited, as Trustee under the Will and of the Estate of John A. McCandless, Deceased, of the assets remaining in the hands of Bishop Trust Company, Limited, as such Executor, Bishop Trust Company, Limited, be discharged from its trust as Executor of the Will of John A. McCandless, Deceased, in all particulars, except that Bishop Trust Company, Limited, shall remain as such Executor for such time as may be necessary to

secure a substitution of itself, as Trustee as aforesaid, as Party-Petitioner in the two appeals before the United States Board of Tax Appeals against the Commissioner of Internal Revenue now pending, so that said appeals may be properly presented and settled; and when such substitution has been effectuated, then and upon the filing herein of a verified statement by such Executor showing the same, Bishop Trust Company, Limited shall be discharged as such Executor in such particulars without any further order being entered by the Court.

Pursuant to such order the petitioner as executor, on January 22, 1936, transferred and delivered to itself as trustee the residue of the decedent's estate and was discharged as executor of the estate, subject to the performance of specific acts, which have since been performed.

The petitioner kept its accounts and made its income tax returns, on both Form 1040 and 1041, on the cash receipts and disbursements basis and on the basis of a fiscal year beginning February 1 and ending January 31. The returns were filed with the collector at Honolulu.

The gross receipts of the estate for the taxable year ended January 31, 1936, consisted of \$73,111.25 from the sales of shares of stock and \$80,359.29 dividends received from domestic corporations. The respondent determined that the gross income of the estate for income tax purposes consisted solely of

dividends from domestic corporations in the amount of \$80,359.29, from which he permitted the deduction therefrom of a capital net loss of \$2,000, sustained on the sales of shares of stock, and other items of expense aggregating \$4,825.10, and arrived at a net income of \$73,534.19.

Included in the residuary estate of the decedent which the petitioner as executor transferred to itself as trustee on January 22, 1936, pursuant to the order of the court made January 21, 1936, was \$20,504.58 cash which had been received by the executor as income during the taxable year ended January 31, 1936. This amount was [20] claimed as a deduction in the return which the petitioner, as executor, filed on behalf of the estate for the fiscal year ended January 31, 1936.

In the determination of the deficiency herein the respondent disallowed the deduction of the said amount of \$20,504.58 on the ground that it did not constitute an allowable deduction under the provisions of section 162 (c) of the Revenue Act of 1934.

The Bishop Trust Co., Ltd., as testamentary trustee, in the return filed on behalf of the trust for the taxable year begun February 1, 1935, and ended January 31, 1936, included in the gross income of the trust estate \$19,639.72 of the said amount of \$20,504.58 and duly paid income tax thereon.

The petitioner paid to Cameron and Johnstone, certified public accountants, during the taxable year ended January 31, 1936, \$2,925 professional fees and \$1,859.35 traveling expenses. These payments cov-

ered the cost of a trip to California for the investigation for Federal income tax purposes of claims for additional income taxes made upon the petitioner for the fiscal years ended January 31, 1932, January 31, 1933, and January 31, 1934; for conferences in Washington with respect to claims for additional taxes; for filing protests and claims for refund; and for the preparation of the income tax return of the estate for the fiscal year ended January 31, 1935.

Our first question is whether the amount of \$20,504.58 representing the accumulated income of the decedent's estate during the period of administration, which the executor in final settlement of the estate paid over to itself as residuary trustee, is deductible from the gross income of the estate.

Section 162 (c) of the Revenue Act of 1934 provides that:

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall

be included in computing the net income of the legatee, heir, or beneficiary.

This issue is controlled by the Board's decision in *Estate of Ida A. White*, 41 B. T. A. 525, where we held on facts not distinguishable from those in the instant case that the income of an estate in process of administration which was paid over to the residuary trustees and reported as income by the trustees in their fiduciary return for that year was deductible by the estate as income paid to a "legatee" [21] within the meaning of section 162 (c) above. In that case we distinguished *Weigel v. Commissioner* (C. C. A. 7th Cir.), 96 Fed. (2d) 387, on the ground that the income there in dispute was a gain from the sale of corpus of the estate and not from income. In its opinion the Board said:

The respondent cites *Weigel v. Commissioner*, 96 Fed. (2d) 387, affirming 34 B. T. A. 237. The facts in that case are readily distinguishable from those in the case at bar. There the question involved was the gain realized from the sale of corpus. By the terms of the will all estate income became part of the corpus of the trust estate. That situation does not exist here. We find that the income in question preserved its identity from its receipt by the petitioners to its payment to the legatee. It was paid as income. * * *

Here, as in the *White* case, the amount in dispute was income of the estate, rather than an accretion

to corpus, and it was paid over to the residuary trustee as income.

See also *Lynchburg Trust & Savings Bank v. Commissioner*, 68 Fed. (2d) 356; certiorari denied, 292 U. S. 640; *George G. Allen et al., Trustees*, 40 B. T. A. 351; and *Angier B. Duke*, 38 B. T. A. 1264.

We hold upon authority of the *Estate of Ida A. White*, *supra*, that the amount of \$20,504.58 is deductible from the gross income of the estate.

The remaining issue is whether the amounts of \$2,925 and \$1,859.35, representing, respectively, accountant's fees and expenses paid by the executor in connection with the settlement of income tax claims of the Government against the estate for years prior to the taxable year before us are legal deductions from gross income.

Section 162 of the Revenue Acts of 1934 and 1936 provides that the income of an estate in process of administration or settlement shall be computed in the same manner as the income of an individual, with certain exceptions not material to the present issue. Section 23 of the same taxing acts provides for the deduction from the gross income of an individual of "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." (Subdivision (a)).

The immediate question before us then is whether the petitioner was engaged "in carrying on any trade or business" within the meaning of the statute during the fiscal year ended January 31, 1936. It

can not be doubted that in some cases an estate in process of administration or settlement is carrying on a trade or business within the meaning of the Statute. See *Pyne v. United States*, — Ct. Cls. — (Oct. 7, 1940). In that case the court held that upon the evidence the estate was engaged in carrying on a trade or business [22] within the meaning of the statute. The evidence showed that the executor was under the necessity of employing several persons to assist in the administration of the estate.

The record in this proceeding does not, in our opinion, show the carrying on of a trade or business by the petitioner during the taxable year. During such year it sold certain shares of stock belonging to the estate at a loss. Its gross income consisted entirely from the receipt of dividends upon shares of stock of domestic corporations. It paid a firm of accountants fees and traveling expenses in connection with the adjustment of the income taxes of the estate for prior years. If John A. McCandless had been living during the taxable year before us and had received the dividends upon his shares of stock, and made the payments here in question, we do not think it could be held that he was carrying on a trade or business within the meaning of the statute and he would not have been entitled to deduct such payments. See *Deputy v. duPont*, 308 U. S. 488.

The facts before us are substantially the same as those which obtained in *Estate of C. R. Hubbard*,

41 B. T. A. 628. In that case we held that the estate was not engaged in carrying on a trade or business within the meaning of the taxing statute. The action of the respondent in disallowing the deduction from the gross income of the payments here in question is approved.

Decision will be entered under Rule 50. [23]

United States Board of Tax Appeals
Washington

Docket No. 97943

ESTATE OF JOHN A. McCANDLESS, DE-
CEASED, BISHOP TRUST COMPANY, LIM-
ITED, EXECUTOR,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the opinion of the Board promulgated on November 27, 1940, the respondent herein on December 20, 1940 having filed a recomputation of tax and the petitioner on January 25, 1941 having filed an acquiescence to such recomputation, now, therefore, it is

ORDERED and DECIDED: That there is a deficiency in income tax in the amount of \$8,308.88 for the fiscal year ended January 31, 1936.

(Signed) CHARLES P. SMITH
Member

Enter:

Entered Jan. 28, 1941. [24]

In the United States Circuit Court of Appeals
for the Ninth Circuit

B.T.A. Docket No. 97943

GUY T. HELVERING, Commissioner of Internal
Revenue,

Petitioner on Review,

v.

BISHOP TRUST COMPANY, LIMITED, EX-
ECUTOR OF THE ESTATE OF JOHN A.
McCANDLESS, DECEASED,

Respondent on Review.

PETITION FOR REVIEW AND STATEMENT
OF POINTS

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit:

Now Comes Guy T. Helvering, Commissioner of
Internal Revenue, by his attorneys, Samuel O.
Clark, Jr., Assistant Attorney General, J. P. Wen-
chel, Chief Counsel, Bureau of Internal Revenue,

and Charles E. Lowery, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

Jurisdiction

That he is duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States; that the respondent on review, Bishop Trust Company, Limited, Executor of the Estate of John A. McCandless, Deceased (hereinafter sometimes referred to as the taxpayer), is a corporation organized and existing under the laws of the Territory of Hawaii, having its principal office and place of business in Honolulu, Hawaii, and was during the taxable year ended January 31, 1936, the taxable period here involved, the duly appointed and [25] acting Executor under the will and of the Estate of John A. McCandless, deceased, a citizen of the United States and a resident of the City of Honolulu, Territory of Hawaii, who died in Honolulu, Hawaii, on January 30, 1930. By order of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers in Probate, dated January 21, 1936, the said Bishop Trust Company, Limited, transferred and delivered to itself on January 22, 1936, as Trustee under the will and of the Estate of John A. McCandless, deceased, the residuary estate of the deceased and has been since said distribution and now is the duly appointed, qualified, and acting Trustee under the will and of the Estate of John A. McCandless, deceased. The tax-

payer did not inform the Commissioner of its discharge as Executor of the Estate of the deceased in the manner provided in Section 312 of the Revenue Act of 1934.

The taxpayer filed its Federal income tax return for the fiscal year ended January 31, 1936, with the Collector of Internal Revenue for the District of Hawaii, whose office is located in the City of Honolulu, Hawaii, and within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit.

The Commissioner files this petition pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

II.

Prior Proceedings

On February 9, 1939, the Commissioner determined a deficiency in Federal income tax liability against the taxpayer for the fiscal year ended January 31, 1936, in the amount of \$15,408.33 and sent to the taxpayer, by registered mail, a notice of said deficiency in accordance with the provisions [26] of existing internal revenue laws. Thereafter and on April 11, 1939, the taxpayer filed an appeal from said determination of the Commissioner with the United States Board of Tax Appeals.

The appeal was duly tried to the United States Board of Tax Appeals and under date of November 27, 1940, the Board promulgated its findings of fact and opinion, pursuant to which opinion decision was entered by the Board on January 28, 1941,

wherein and whereby it was ordered and decided that there is a deficiency in income tax in the amount of \$8,308.88 for the fiscal year ended January 31, 1936.

III.

Nature of Controversy

The decedent, John A. McCandless, died testate on January 30, 1930, leaving a large estate and naming the Bishop Trust Company, Limited, as his executor and also as the testamentary trustee of his residuary estate. In his will the decedent, after making provision for certain monthly payments by the executor to his widow and his four grandchildren until such time as his residuary estate should be turned over to the designated testamentary trustee, gave and bequeathed certain specific amounts to other designated parties, devised and bequeathed certain properties to his widow, and made the further provision that:

“I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal or mixed, wheresoever situated and of every kind or nature, and any property over which I shall possess any power of appointment, to Bishop Trust Company, Limited, an Hawaiian corporation, in trust for the uses and purposes and with the powers as hereinafter stated, * * *” [27]

The trustee was directed to continue the monthly payments to the widow until the eldest grandchild should attain the age of 21 years, after which the

widow was to receive one-tenth of the annual net income of the trust estate, and to continue the monthly payments to each grandchild until he or she attained the age of 21 years when he or she was to receive one-tenth of the annual net income of the trust estate. The surplus income of the trust estate was to be accumulated and invested and when the youngest grandchild should attain the age of 30 years the trust was to determine and a one-fifth portion of the estate was to be paid over to the widow, if living, and one-fifth to each grandchild per stirpes.

Pursuant to the order of court, as aforesaid, the taxpayer executor, on January 22, 1936, transferred and delivered to itself as trustee the residue of decedent's estate. For the fiscal year beginning February 1, 1935, the estate had gross receipts of \$73,111.25 from sales of shares of stock and \$80,359.29 in dividends received from domestic corporations. The Commissioner determined that the gross income of the estate for income tax purposes consisted solely of dividends from domestic corporations in the amount of \$80,359.29, from which he permitted the deduction therefrom of a capital net loss of \$2,000, sustained on the sales of shares of stock, and other items of expense aggregating \$4,825.10, and arrived at a net income of \$73,534.19. Among the assets of the residuary estate which were transferred to the trustee on January 22, 1936, was \$20,504.58 cash which had been received by the executor as income during the taxable year ended January 31,

1936, and which was claimed as a deduction from gross income in the return filed on behalf of the estate for the fiscal year ended January 31, 1936. The Commissioner disallowed the claimed deduction on the ground that the amount so [28] transferred did not constitute an allowable deduction under the provisions of Section 162(c) of the Revenue Act of 1934.

IV.

STATEMENT OF POINTS

Following is a concise statement of the points upon which the Commissioner intends to rely on the review herein petitioned, to-wit:

The United States Board of Tax Appeals erred:

1. In ordering and deciding that there is a deficiency in income tax for the fiscal year ended January 31, 1936, in the amount of only \$8,308.88.

2. In failing to order and decide that there is a deficiency in income tax for the fiscal year ended January 31, 1936, in the amount of, to-wit, \$15,408.33 as determined by the Commissioner.

3. In holding and deciding that \$20,504.58 representing income received by the estate during the taxable year "that was properly paid during such year to Bishop Trust Company, Limited, Trustee and sole residuary legatee under the will and of the Estate of John A. McCandless, deceased" was a legal deduction from gross income under Section 162(c) of the Revenue Act of 1934.

4. In failing to hold and decide that \$20,504.58 representing income received by the estate during

the taxable year "that was properly paid during such year to Bishop Trust Company, Limited, Trustee and sole residuary legatee under the will and of the Estate of John A. McCandless, deceased" was not a legal deduction from gross income under Section 162(c) of the Revenue Act of 1934.

5. In holding and deciding that \$20,504.58 representing income [29] received by the estate during the taxable year "that was properly paid during such year to Bishop Trust Company, Limited, Trustee and sole residuary legatee under the will and of the Estate of John A. McCandless, deceased" was paid to the residuary trustee as income.

6. In failing to hold and decide that \$20,504.58 representing income received by the estate during the taxable year "that was properly paid during such year to Bishop Trust Company, Limited, Trustee and sole residuary legatee under the will and of the Estate of John A. McCandless, deceased" was not paid over to the residuary trustee as income but rather that the amount so transferred was paid over as part of the res of the residuary trust established by the will of John A. McCandless, deceased.

7. In that its opinion and decision are not supported by but are contrary to its findings of fact.

8. In that its opinion and decision are not supported by the evidence and are contrary to law.

Wherefore, the Commissioner petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit

Court of Appeals for the Ninth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

(Signed) J. P. WENCHEL

RLW

Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

CHARLES E. LOWERY,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: U. S. B. T. A. Filed Apr. 19, 1941.

[30]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

NOTICE OF FILING PETITION FOR RE-
VIEW AND STATEMENT OF POINTS

To:

Urban E. Wild., Esq.,
Milton Cades, Esq.,
400 Bishop Trust Building,
Honolulu, Territory of Hawaii.

You are hereby notified that the Commissioner of Internal Revenue did, on the 19th day of April, 1941, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Board heretofore rendered in the above-entitled case and a statement of points. A copy of the petition for review and the statement of points as filed is hereto attached and served upon you.

Dated this 19th day of April, 1941.

(Signed) J. P. WENCHEL

RLW

Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review

and the statement of points mentioned therein, is hereby acknowledged this 26 day of April, 1941.

URBAN E. WILD

MILTON CADES

Counsel for Respondent on
Review.

[Endorsed]: U. S. B. T. A. Filed May 13, 1941.

[31]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

NOTICE OF FILING PETITION FOR RE-
VIEW AND STATEMENT OF POINTS

To:

Bishop Trust Company, Limited,
Corner of King and Bishop Streets,
Honolulu, Territory of Hawaii.

You are hereby notified that the Commissioner of Internal Revenue did, on the 19th day of April, 1941, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Board heretofore rendered in the above-entitled case and a statement of points. A copy of the petition for review and the statement of points as filed is hereto attached and served upon you.

Dated this 19th day of April, 1941.

(Signed) J. P. WENCHEL

RLW

Chief Counsel,

Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and the statement of points mentioned therein, is hereby acknowledged this 26 day of April, 1941.

BISHOP TRUST COMPANY,
LIMITED, EXECUTOR OF
THE ESTATE OF JOHN A.
McCANDLESS, DECEASED,
W. W. WHITE

Vice Pres.

Respondent on Review.

[Endorsed]: U. S. B. T. A. Filed May 13, 1941.

[32]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

STATEMENT OF EVIDENCE

This proceeding came on for hearing on May 2, 1940, before the Honorable Charles P. Smith, Member of the United States Board of Tax Appeals, at Honolulu, Hawaii. The taxpayer was represented by Urban E. Wild, Esq., Milton Cades, Esq., and

E. R. Cameron, C. P. A., Honolulu, T. H., and the Commissioner by T. M. Mather, Esq.

After counsel had made their respective statements of the case, the following evidence was presented to the Board:

There were offered and received in evidence as petitioner's (taxpayer's) exhibits the following documents:

Exhibit 1—Federal income tax return, Form 1040, of the Estate of John A. McCandless, deceased, for the fiscal year ended January 31, 1936.

Exhibit 2—Federal fiduciary return, Form 1041, of the Estate of John A. McCandless, deceased, for the fiscal year ended January 31, 1936.

Exhibit 3—Federal income tax return, Form 1040, of John A. McCandless trust for the fiscal year ended January 31, 1936.

Exhibit 4—Federal fiduciary return, Form 1041, of John A. McCandless trust for the fiscal year ended January 31, 1936. [33]

Exhibit 5—Copy of will of John A. McCandless, deceased.

Exhibit 6—Copy of order approving account, determining trust and distributing estate of John A. McCandless, deceased.

Exhibit 7—Final receipt certified to by clerk of the court showing receipt by Bishop Trust Co., Ltd., of assets of estate of John A. McCandless, deceased.

MR. ERNEST ROY CAMERON,

called as a witness by and on behalf of the petitioner (taxpayer) having been first duly sworn, was examined and testified in respect of certain items of traveling expense and professional fees not here involved in this review. Such testimony, therefore, is not herein narrated.

MR. ERNEST ROY CAMERON,

having been previously sworn, was examined and testified as follows as a witness for the Commissioner:

By Mr. Mather:

Q. Mr. Cameron, I previously showed you a document which I believe you admitted was prepared by you or under your direction?

A. It was prepared by me.

Q. Does that document contain receipts and disbursements of this Petitioner for the taxable year here in question as shown by their books of account?

A. It does in summarized form.

Q. And the figures thereon were taken from the books? A. They were.

Mr. Mather: If your Honor please, at this time I will offer in evidence document just testified to by counsel for the purpose of showing receipts and disbursements as shown on the books of this petitioner for the taxable year in question.

Mr. Wild: What is the purpose of the exhibit, what is the purpose?

(Testimony of Ernest Roy Cameron.)

Mr. Mather: For the purpose of showing the receipts and disbursements as shown by the books of this taxpayer for the taxable year involved in this proceeding before the Board. [34]

Mr. Wild: That is not an issue, Your Honor. If you want me to admit that the Bureau of Internal Revenue after careful study of the matter, admitted that the \$20,534 and odd cents was income of the estate during that period of time, I, on information, am now prepared to make that admission. That admission is made on the basis of figures similar to these and I am perfectly willing to admit that, Your Honor, but these figures have no bearing on any issue. I do not see what basis they are offered on. There is no claim that there was any omitted income in the return. There is no claim that they, together with the 90-day letter, do not state the true picture. Nothing of that sort, Your Honor. In consequence, I can see no reason at this time, for introducing this exhibit in evidence. I might say I merely glanced at it, I have not digested it.

Mr. Mather: One of the reasons involved in this proceeding is whether this Petitioner is entitled to deduction of \$20,000 some odd from its return during the period of administration that is involved in this proceeding, that is one of the issues. Now the Commissioner disallowed as a deduction that \$20,000.

I stated one reason in my opening statement why it was disallowed. The question for decision by this Board is whether or not this Petitioner is entitled

(Testimony of Ernest Roy Cameron.)

to deduction. I certainly have a right to present evidence with respect to the deductibility of that item for this taxable year.

Mr. Wild: May it please the Court, it looks to me as if counsel is trying to get something into the record, on which he can argue, though that is not the fact, that this \$20,000 was not income. That is already admitted in the evidence. It is an admission. [35]

If no part of this exhibit is for that purpose of arguing, anything to show in regard to whether or not the \$20,000 is income, that is one set of affairs; if it is for a different purpose, then I think you ought to state it frankly to the Court.

Mr. Mather: I am stating it very fully. It is offered for the purpose of showing whether or not this Petitioner is entitled to a deduction of the \$20,000 item from income for the taxable year, that is in this proceeding before the Board.

Mr. Wild: And it is offered, is it, together with the admission that the amount shown is income?

Mr. Mather: No, sir, it is not.

Mr. Wild: Then we renew our objection, Your Honor.

The Member: The objection is overruled.

Mr. Wild: To which we may have our exception?

The Member: Exception noted. It may be received in evidence as Respondent's Exhibit A.

(The said document, statement of receipts and disbursements and expenditures, estate of

(Testimony of Ernest Roy Cameron.)

John A. McCandless, deceased, February 1, 1935 to January 31, 1936, so offered and received in evidence, was marked Respondent's Exhibit A and made a part of this record.)

Cross Examination

By Mr. Wild:

Q. Mr. Cameron, showing you this exhibit, Respondent's Exhibit A, does that show anything concerning the connection of the \$20,534 and odd cents of cash that was on hand on January 22, 1936?

A. It does (examining paper).

Q. What does it show that sum was?

A. The nature of the sum?

Q. Yes. [36]

A. It shows that it was income received by the estate in administration during the fiscal year ended January 21, 1936.

Mr. Mather: Well, now, if Your Honor please, I will ask that that answer be stricken as not responsive to the question, because I did not have an opportunity to object to any such answer as that. The question was "Does this exhibit show"—

The Member: Read the question, Mr. Reporter. (Whereupon, the Reporter read the question as recorded.)

Mr. Mather: Now that answer calls for an it does or it doesn't answer, and it does not call for a conclusion as to what the character is.

Mr. Wild: May it please the Court, as I understand the rule of evidence, the only party who can

(Testimony of Ernest Roy Cameron.)

make a motion to strike an answer which is not responsive, is the party propounding the question. I do not think counsel's ground there would be well taken.

The Member: The motion to strike the answer is granted, and read the question again. Let the witness again answer the question.

(Whereupon, the Reporter read the question as above recorded.)

The Member: First, let me ask what was the actual amount of the cash that was on hand on the date stated?

The Witness: \$20,534.58.

The Member: Now, can you answer Mr. Wild's question?

The Witness: I think the answer was before and is now that it does.

By Mr. Wild:

Q. What does it show the sum of money to be?

A. That is the question I answered.

Mr. Mather: The exhibit speaks for itself.

The Member: That objection is overruled. [37]

Mr. Mather: Exception.

A. It shows the balance of the income realized in the fiscal year ended January 21, 1936 received by the Executor of the Estate of John A. McCandless, deceased.

By Mr. Wild:

Q. What is the amount of that balance of income on hand? A. \$20,504.58.

(Testimony of Ernest Roy Cameron.)

Mr. Wild: No further cross-examination.

Mr. Mather: No further questions.

The foregoing statement, together with the exhibits mentioned therein, constitutes all of the evidence adduced at the hearing before the United States Board of Tax Appeals material to the review taken by the Commissioner.

J. P. WENCHEL

Chief Counsel,

Bureau of Internal Revenue.

Attorney for Petitioner on
Review.

URBAN E. WILD

MILTON CADES

Attorneys for Respondent on
Review. [38]



FIDUCIARY RETURN OF INCOME

For Calendar Year 1934

The Most Widely Used System

Received February 1, 1901, and January 21, 1901.

File the Return No Later Than the 15th Day of the Third Month Following the Close of the Taxable Year
(PRINT NAME AND ADDRESS PLAINLY BELOW)

~~From~~ JOHN A. McCANDLESS, DECEASED

Bishop Trust Company, Ltd.

King & Bishop Streets

Honolulu, T. H.

126

1

1

1990

Title _____
 Address _____
 City _____

1. Was a return of income for the year 1937 filed on behalf of the estate or trust named above? Yes
 2. If so, in which department's office was it sent? (Give district or city and street) Honolulu
 3. If copy of will or trust instrument and statement required under Instruction 23 have been previously furnished, state when and with whom they were sent. Private tax return; Collector of Internal Revenue, Honolulu, T. H.
 4. State whether books are kept on cash or accrual basis. Cash
 5. Did any person or persons advise you in respect of any question or matter affecting any item or schedule of this return, or assist or advise you in the preparation of this return, or actually prepare this return for you? Yes If so, give the name and address of each person or persons and state the nature and extent of the assistance or advice received by you and the items or schedules in respect of which the assistance or advice was received. If the return was actually prepared by any person or persons other than yourself, state the source of the information reported in this return and the manner in which it was furnished to or obtained by such person or persons. Cameron & Johnstone Books
 6. State the date when the return was prepared. (Give the calendar year 1937. (Answer "yes" or "no") No

INCOME

1. 1941 profits (or loss) from Trade or Business. (From Schedule A)	
2. Interest on Bank Deposits, Notes, and Corporation Bonds, etc. (except interest on tax-free investment bonds)	
3. Interest on Tax-free Government Bonds upon which a tax was paid at source	
4. Income (or loss) from Partnerships, Syndicates, Pools, etc., and Fiduciaries. (State name and address)	
5. Dividends and Sistributions. (From Schedule D)	2,000.00
6. Capital Gains (or Loss). (From Schedule C)	
7. Net Income from Stock of:	31,082.00
(a) Domestic Corporations subject to taxation under Title I of Revenue Act of 1936	
(b) Domestic Corporations not subject to taxation under Title I of Revenue Act of 1936	
(c) Foreign Corporations	
8. Other Income. (Give nature of income)	
Total Income or Loss 1 to 8	33,082.00

DEDUCTIONS

10. Interest Paid. (Explain in Schedule E.)	566.68
11. Taxes Paid. (Explain in Schedule E.)	400.19
12. Loans by Firm, Share, etc. (Explain in Table at foot of page 37)	
13. Bad debts (including loans determined to be worthless during taxable year). (Explain in Schedule E.)	
14. Cash Payments. (Explain in Schedule E.)	
15. Other Deductions Authorized by Law (including stock determined to be worthless during taxable year). (Explain in Schedule E.)	2,951.80
16. TOTAL DEDUCTIONS IN ITEMS 10 TO 15	3,908.77

BENEFICIARIES' SHARES OF INCOME AND CREDITS
(See Instruction 16)

1. Name and Address of Last Beneficiary (Indicate whether person and non-individual client) Name—Applicant or beneficiary is listed in another collection district, specify district		2. Payment of \$100 or less \$100.00	3. Payment of \$100 or more \$100.00	4. Payment of \$100 or more \$100.00	5. Payment of \$100 or more \$100.00	6. Payment of \$100 or more \$100.00	7. Payment of \$100 or more \$100.00	8. Payment of \$100 or more \$100.00
Bishop Trust Co., Ltd. Executor/Trustee under the will of John A. McCandless, deceased, Honolulu, T. H.		100	19,423.72					

NONTAXABLE OBLIGATIONS, LIBERTY BONDS, ETC.

1. Description of Securities		2. Amount Owed or Due on Date	3. Maturity Date
(a) Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia, or United States possessions			
(b) Obligations issued under the provisions of the Federal Farm Loan Act, or under such act as amended			
(c) Liberty 3 1/2% Bonds and other obligations of United States issued on or before September 1, 1917			
(d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness			
(e) Liberty 4% and 4 1/2% Bonds, U. S. Savings Bonds, and Treasury Bonds			
(f) Obligations of instrumentalities of the United States other than obligations (a) to (e) reported in (c)			

B

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN \$2,000 AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1934

or Social year beginning on January 1, 1935, and ending December 31, 1935

Do Not Leave the Last Two or Three Lines Blank

PRINT NAME AND ADDRESS PLAINLY BELOW

ESTATE OF JOHN A. McCANDLESS, deceased
Bishop Trust Co., Ltd., Executor/Trustee

Honolulu T.H.

126
MARCH 20001
HA 771

- State whether you are (a) citizen of the United States or (b) resident alien
- If you filed a return for the preceding year in which "Voluntary" return was made
- Were you married and living with husband or wife during your taxable year?
- Did you have a child?
- Place name of husband or wife (if deceased, state date of death) and the address at which you last resided
- State whether you were (a) owner of any property in which you had an interest or (b) a partner in any business or profession
- How much dependent persons (other than husband or wife) under 18 years of age or incapable of self-support resided with you during your taxable year?

- If your status in respect to question 1, 2, or 3 changed
- State whether your home is kept on cash or contract basis
- State principal occupation or profession
- Did you transfer to or receive from any person any money or property in excess of \$5,000 during the calendar year 1934, without an adequate and full consideration in money or money's worth?
- If you did give a gift last year, on Form 706 or an information return on Form 707

- Did any person or persons advise you in respect of your question or similar offering any loan or advantage of this return, or cause or advise you in the preparation of this return, or actually prepare this return for you?
- Did you make a change of information on Form 106 and 106-2 (Instructions 31) for the calendar year 1934?

INCOME

- Salaries, Wages, Commissions, Fees, etc. (State name and address of employer)
- Net profit (or loss) from Business or Profession. (From Schedule A)
- Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds)
- Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source
- Income (or Loss) from Partnerships, Syndicates, Pools, etc. (Partners name, address, and kind of business)
- Income from Fiduciaries. (Partners name and address)
- Rents and Royalties. (From Schedule B)
- Capital Gain (or Loss). (From Schedule C)
- Taxable Interest on Liberty Bonds, etc. (From Schedule D, Line 10)
- Dividends on Stock of: (a) Domestic Corporations subject to taxation under Title I of 1904 Act (b) Domestic Corporations not subject to taxation under Title I of 1904 Act (c) Foreign Corporations

U.S. DEPARTMENT OF TAXATION
MAY - 2 1934

19,638.64

DEDUCTIONS

- Interest Paid. (Explain in Schedule F)
- Taxes Paid. (Explain in Schedule F)
- Losses by Fire, Storm, etc. (Explain in table at end of page 2)
- Bad Debts (including bonds determined to be worthless during taxable year)
- Contributions. (Explain in Schedule F)
- Other Deductions Authorized by Law (including stock determined to be worthless during taxable year)
- TOTAL DEDUCTIONS IN ITEMS 13 TO 16
- NET INCOME Item 12 minus Item 16

19,638.64

COMPUTATION OF TAX (See Instruction 25)

21. Net income Item 20 above	19,638.64	29. Normal tax (47% of Item 28)	
22. Less: Personal exemption	1,000.00	30. Surtax on Item 24. (See Instruction 25)	1,083.02
23. Credit for Dependents		31. Total tax (Item 29 plus Item 30)	1,083.02
24. Balance. Surtax net income	18,638.64	32. Less: Income tax paid at source (2% of Item 4)	
25. Less: Interest on Liberty Bonds		33. Income tax paid to a foreign country or U.S. possession	
26. Dividends Item 10	19,638.64	34. Balance of Tax. (Item 31 minus Items 32 and 33)	1,083.02
27. Earned income credit			1/4 = \$270.76
28. Balance subject to normal tax	None		

AFFIDAVIT (See Instruction 27)

I do swear (or affirm) that this return, including its accompanying schedules and statements, if any, has been examined by me/us, and in the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1904 and the Regulations issued thereunder.

Subscribed and sworn to before me this 1934 before Bishop Trust Company, Limited
John A. McCandless, Dec'd.

AFFIDAVIT (See Instruction 27)

I do swear (or affirm) that I have prepared this return for the person or persons named herein and that the return (including its accompanying schedules and statements, if any) is a true, correct, and complete statement of all the information respecting the income tax liability of the person or persons for whom this return has been prepared of which I have any knowledge.

Subscribed and sworn to before me this day of 1934

(Reverse not filled in)

SCHEDULE A—PROFIT (OR LOSS) FROM TRADE OR BUSINESS (See instruction 1)

1. Total receipts from trade or business (state kind of business)		OTHER REVENUES (continued)	
Care of Gross Sales		10. Salaries, except "Labour" reported on Line 2	
2. Labor	3	11. Interest on business indebtedness to others	
3. Material and supplies	4	12. Taxes on business and business property	
4. Merchandise bought for sale	5	13. Losses (explain in table at foot of page)	
5. Other costs (explain below or on separate sheet)	6	14. Bad debts arising from sales	
6. Free inventory at beginning of year	7	15. Depreciation (disclosures, and in column explain in table provided at foot of page)	
7. Total (Lines 2 to 6)	8	16. Rent, repairs, and other expenses (disclosures law or on separate sheet)	
8. Free inventory at end of year	9	17. Total (Lines 10 to 16)	
9. Net Care of Gross Sales (Line 7 minus Line 8)	10	18. TOTAL DEDUCTIONS (Line 9 plus Line 17)	
Enter "G", or "C or M", on Lines 5 and 6 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.		19. NET PROFIT (Line 1 minus Line 18). Enter on Item 1	

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES See Instruction 5[illegible]

SCHEDULE C-CAPITAL GAINS AND LOSSES (FROM SALES OR EXCHANGES ONLY) See Instruction 1

1. Description of Property and Person Made	2. Date Acquired	3. Date Sold or Surrendered	4. Cash Sales Price (Current Price)	5. Cost or Basis (Less Losses)	6. Date of Sale or Surrender	7. Name of Buyer or Recipient	8. Name of Seller or Transferor
* All 1 year or less	Mr. Day West Mr. Day West						
* All Over 1 year but not over 5 years							
* All Over 5 years but not over 10 years							
* All Over 10 years but not over 20 years							
* All Over 20 years							

SCHEDULE D—INCOME FROM DIVIDENDS

Dividend all dividends received during the year, stating amounts and names and addresses of corporations declaring the dividends:
C. Brewer & Co., Ltd., Honolulu, T. H. \$216.00

SCHEDULE E—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 10, 11, 13, 14, AND 15

T. H. excise tax, \$1.08

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

[illegible]

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A AND IN ITEM 12

1. Date of Purchase	2. Date Acquired	3. Cost	4. Original Acquisition Basis	5. Depreciation Allowed or Allowed to be Claimed	6. Fair Market Value at Sale	7. Capital Gain or Loss
		3	4	5	6	7

AFFIDAVIT (See Instruction 25)

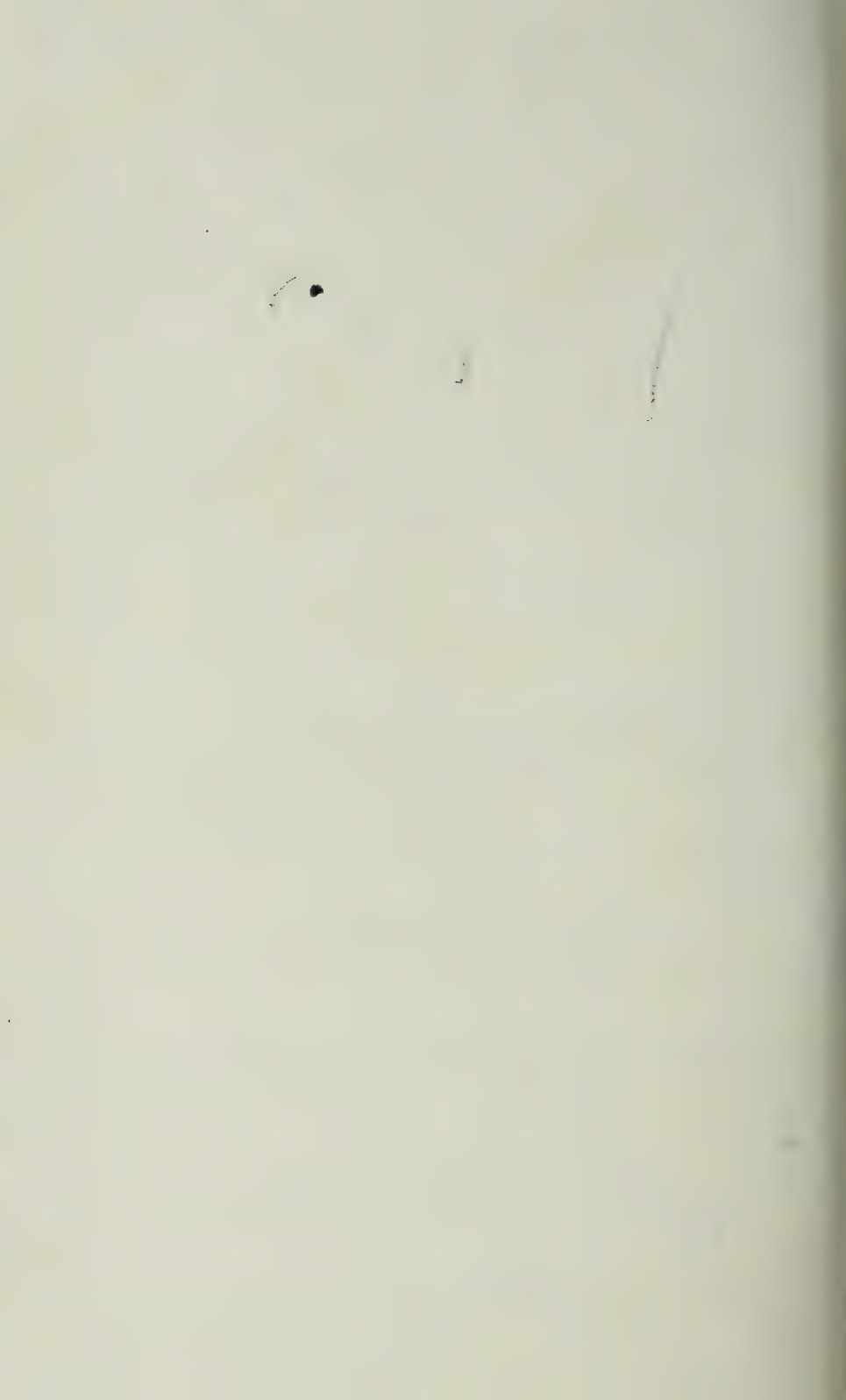
I swear (or affirm) that this return, including its accompanying schedules and statements, is true, correct, and full, and that the accounting period stated on the return is the correct accounting period for the taxable year.

Blowers to and postscript 0-4

AFFIDAVIT (See Instruction 25)

I swear the above that I prepared this return for the year ended, if any, is a true, correct, and complete statement of all the income of which I am here assessed for.

1990-1991



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

FIDUCIARY RETURN OF INCOME

For Calendar Year 1938

Do Not Write in These Spaces

No. 126
Date 1938
Social Security Number 555 F
State Hawaii
(State Number)

On Final year began January 1, 1938, and ended December 31, 1938

File this Return Not Later Than the 15th Day of the Third Month Following the Close of the Taxable Year
(PRINT NAMES AND ADDRESS PLAINLY BELOW)

Name of Successor Trust JOHN A. MCCANDLESS TRUST

Bishop Trust Company, Ltd.

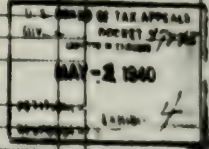
Name and Address of Fiduciary King and Bishop Streets

Honolulu, T. H.

1. Was a return of income for the prior year filed on behalf of the estate or trust named above? Yes
2. If so, to which collector's office was it sent? (Give district or city and state) Honolulu
3. If copy of will or trust instrument and statement required under Instruction 23 have been previously furnished, state when and with whom they were sent Estate tax return; Collector of Internal Revenue, Honolulu, T. H.
4. State whether books are kept on cash or accrual basis Cash
5. Did any person or persons advise you in respect of any question or matter affecting any item or schedule of this return, or assist or advise you in the preparation of this return, or actually prepare this return for you? Yes If so, give the name and address of such person or persons and state the nature and extent of the assistance or advice received by you and the items or schedules in respect of which the assistance or advice was rendered; If this return was actually prepared by any person or persons other than yourself, state the source of the information reported in this return and the manner in which it was furnished to or obtained by such person or persons Cameron A. Johnstone Books
6. Did you make a return of information on Forms 1098 and 1099 (see Instruction 38) for the calendar year 1938? (Answer "yes" or "no") No

INCOME

1. Net Profit (or Loss) from Trade or Business. (From Schedule A) _____
2. Interest on Bank Deposits, Notes, and Corporation Bonds, etc. (except interest on tax-free covenant bonds) _____
3. Interest on Tax-free Covenant Bonds upon which a tax was paid at source _____
4. Income (or Loss) from Partnerships, Syndicates, Pools, etc., and Fiduciaries. (State name and address) _____
5. Bonds and Royalties. (From Schedule B) _____
6. Capital Gain (or Loss). (From Schedule C) _____
7. Dividends on Stock of: Estate of John A. McCandless, dec'd. 19,423.78
(a) Domestic Corporations subject to taxation under Title I of Revenue Act of 1938. 216.00
(b) Domestic Corporations not subject to taxation under Title I of Revenue Act of 1938 _____
(c) Foreign Corporations _____
8. Other Income. (State nature of income) _____
9. TOTAL INCOME IN ITEMS 1 TO 8. 19,639.78



DEDUCTIONS

10. Interest Paid. (Explain in Schedule E) _____
11. Taxes Paid. (Explain in Schedule E) 1.00
12. Losses by Fire, Storm, etc. (Explain in Table at end of page 2) _____
13. Bad debts (including bonds determined to be worthless during taxable year). (Explain in Schedule E) _____
14. Contributions. (Explain in Schedule E) _____
15. Other Deductions Authorized by Law (including stock determined to be worthless during taxable year). (Explain in Schedule E) _____
16. TOTAL DEDUCTIONS IN ITEMS 10 TO 15. 1.00
17. Net Income (Item 9 minus Item 16) 19,638.64

BENEFICIARIES' SHARES OF INCOME AND CREDITS

(See Instruction 18)

1. NAME AND ADDRESS OF EACH BENEFICIARY (Transcribe surviving spouse and independent children None - Where return of beneficiary is filed in another collection district, specify district)	2. PER-CENTAGE OF SHARE OF TAX-EXEMPT INTEREST	3. DEDUCTIONS (From 1, 2, 3, above, or from 17, whichever amount is smaller)	4. BALANCE OF NET INCOME (From 17, minus Item 3, 4, 5)	5. INCOME TAX PAID AT SOURCE (7% of Item 4)	6. INCOME TAX PAID BY BENEFICIARY (Transcribe from Certificate of Credit Income Payments)
(a) <u>Bishop Trust Company, Limited</u>					
(b) <u>Executor/Trustee under the will of</u>					
(c) <u>John A. McCandless, deceased,</u>					
(d) <u>Honolulu, T. H.</u>	<u>100</u>	<u>19,638.64</u>			
(e) _____					
(f) _____					
(g) _____					
(h) _____					
TOTAL		<u>19,638.64</u>			

NONTAXABLE OBLIGATIONS, LIBERTY BONDS, ETC.

(See Instruction 19)

19. (a) Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia, or United States possessions _____
- (b) Obligations issued under the provisions of the Federal Farm Loan Act or under such act as amended _____
- (c) Liberty 3½% Bonds and other obligations of United States issued prior to September 1, 1917 _____
- (d) Treasury Notes, Treasury Bills, and Treasury Certificate of Indebtedness _____
- (e) Liberty 4%, 5%, and 6% Bonds, U. S. Savings Bonds, and U. S. Treasury Bonds _____
- (f) Obligations of the U. S. Government or of any political subdivision thereof _____

SCHEDULE A—PROFIT OR LOSS FROM TRADE OR BUSINESS (See Instruction 1)

1. Kind of business (State kind of business)	2. Date or Dates	3. Gross Receipts	4. Gross Expenses	5. Net Profit (Enter on Line 6)
6. Gross Receipts	7. Gross Expenses	8. Net Profit	9. Gross Receipts	10. Gross Expenses
11. Net Profit	12. Gross Receipts	13. Gross Expenses	14. Net Profit	15. Gross Receipts
16. Gross Receipts	17. Gross Expenses	18. Net Profit	19. Gross Receipts	20. Gross Expenses
21. Net Profit	22. Gross Receipts	23. Gross Expenses	24. Net Profit	25. Gross Receipts
26. Gross Receipts	27. Gross Expenses	28. Net Profit	29. Gross Receipts	30. Gross Expenses
31. Net Profit	32. Gross Receipts	33. Gross Expenses	34. Net Profit	35. Gross Receipts
36. Gross Receipts	37. Gross Expenses	38. Net Profit	39. Gross Receipts	40. Gross Expenses
41. Net Profit	42. Gross Receipts	43. Gross Expenses	44. Net Profit	45. Gross Receipts
46. Gross Receipts	47. Gross Expenses	48. Net Profit	49. Gross Receipts	50. Gross Expenses
51. Net Profit	52. Gross Receipts	53. Gross Expenses	54. Net Profit	55. Gross Receipts
56. Gross Receipts	57. Gross Expenses	58. Net Profit	59. Gross Receipts	60. Gross Expenses
61. Net Profit	62. Gross Receipts	63. Gross Expenses	64. Net Profit	65. Gross Receipts
66. Gross Receipts	67. Gross Expenses	68. Net Profit	69. Gross Receipts	70. Gross Expenses
71. Net Profit	72. Gross Receipts	73. Gross Expenses	74. Net Profit	75. Gross Receipts
76. Gross Receipts	77. Gross Expenses	78. Net Profit	79. Gross Receipts	80. Gross Expenses
81. Net Profit	82. Gross Receipts	83. Gross Expenses	84. Net Profit	85. Gross Receipts
86. Gross Receipts	87. Gross Expenses	88. Net Profit	89. Gross Receipts	90. Gross Expenses
91. Net Profit	92. Gross Receipts	93. Gross Expenses	94. Net Profit	95. Gross Receipts
96. Gross Receipts	97. Gross Expenses	98. Net Profit	99. Gross Receipts	100. Gross Expenses

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 2)

1. Name of Property	2. Amount	3. Gross Income	4. Deductions	5. Net Income
6. Name of Property	7. Amount	8. Gross Income	9. Deductions	10. Net Income
11. Name of Property	12. Amount	13. Gross Income	14. Deductions	15. Net Income
16. Name of Property	17. Amount	18. Gross Income	19. Deductions	20. Net Income
21. Name of Property	22. Amount	23. Gross Income	24. Deductions	25. Net Income
26. Name of Property	27. Amount	28. Gross Income	29. Deductions	30. Net Income
31. Name of Property	32. Amount	33. Gross Income	34. Deductions	35. Net Income
36. Name of Property	37. Amount	38. Gross Income	39. Deductions	40. Net Income
41. Name of Property	42. Amount	43. Gross Income	44. Deductions	45. Net Income
46. Name of Property	47. Amount	48. Gross Income	49. Deductions	50. Net Income
51. Name of Property	52. Amount	53. Gross Income	54. Deductions	55. Net Income
56. Name of Property	57. Amount	58. Gross Income	59. Deductions	60. Net Income
61. Name of Property	62. Amount	63. Gross Income	64. Deductions	65. Net Income
66. Name of Property	67. Amount	68. Gross Income	69. Deductions	70. Net Income
71. Name of Property	72. Amount	73. Gross Income	74. Deductions	75. Net Income
76. Name of Property	77. Amount	78. Gross Income	79. Deductions	80. Net Income
81. Name of Property	82. Amount	83. Gross Income	84. Deductions	85. Net Income
86. Name of Property	87. Amount	88. Gross Income	89. Deductions	90. Net Income
91. Name of Property	92. Amount	93. Gross Income	94. Deductions	95. Net Income
96. Name of Property	97. Amount	98. Gross Income	99. Deductions	100. Net Income

SCHEDULE C—CAPITAL GAINS AND LOSSES (FROM SALES OR EXCHANGES ONLY) (See Instruction 3)

1. Description of Property	2. Date Acquired	3. Date Sold	4. Gross Sales Price	5. Cost or Other Basis	6. Capital Gain or Loss	7. Taxable Capital Gain or Loss
1. Description of Property	2. Date Acquired	3. Date Sold	4. Gross Sales Price	5. Cost or Other Basis	6. Capital Gain or Loss	7. Taxable Capital Gain or Loss
8. Description of Property	9. Date Acquired	10. Date Sold	11. Gross Sales Price	12. Cost or Other Basis	13. Capital Gain or Loss	14. Taxable Capital Gain or Loss
15. Description of Property	16. Date Acquired	17. Date Sold	18. Gross Sales Price	19. Cost or Other Basis	20. Capital Gain or Loss	21. Taxable Capital Gain or Loss
22. Description of Property	23. Date Acquired	24. Date Sold	25. Gross Sales Price	26. Cost or Other Basis	27. Capital Gain or Loss	28. Taxable Capital Gain or Loss
29. Description of Property	30. Date Acquired	31. Date Sold	32. Gross Sales Price	33. Cost or Other Basis	34. Capital Gain or Loss	35. Taxable Capital Gain or Loss
36. Description of Property	37. Date Acquired	38. Date Sold	39. Gross Sales Price	40. Cost or Other Basis	41. Capital Gain or Loss	42. Taxable Capital Gain or Loss
43. Description of Property	44. Date Acquired	45. Date Sold	46. Gross Sales Price	47. Cost or Other Basis	48. Capital Gain or Loss	49. Taxable Capital Gain or Loss
50. Description of Property	51. Date Acquired	52. Date Sold	53. Gross Sales Price	54. Cost or Other Basis	55. Capital Gain or Loss	56. Taxable Capital Gain or Loss
57. Description of Property	58. Date Acquired	59. Date Sold	60. Gross Sales Price	61. Cost or Other Basis	62. Capital Gain or Loss	63. Taxable Capital Gain or Loss
64. Description of Property	65. Date Acquired	66. Date Sold	67. Gross Sales Price	68. Cost or Other Basis	69. Capital Gain or Loss	70. Taxable Capital Gain or Loss
71. Description of Property	72. Date Acquired	73. Date Sold	74. Gross Sales Price	75. Cost or Other Basis	76. Capital Gain or Loss	77. Taxable Capital Gain or Loss
78. Description of Property	79. Date Acquired	80. Date Sold	81. Gross Sales Price	82. Cost or Other Basis	83. Capital Gain or Loss	84. Taxable Capital Gain or Loss
85. Description of Property	86. Date Acquired	87. Date Sold	88. Gross Sales Price	89. Cost or Other Basis	90. Capital Gain or Loss	91. Taxable Capital Gain or Loss
92. Description of Property	93. Date Acquired	94. Date Sold	95. Gross Sales Price	96. Cost or Other Basis	97. Capital Gain or Loss	98. Taxable Capital Gain or Loss
99. Description of Property	100. Date Acquired	101. Date Sold	102. Gross Sales Price	103. Cost or Other Basis	104. Capital Gain or Loss	105. Taxable Capital Gain or Loss

(1) Total Gains and Losses (Enter net amount as Item 6) (Capital losses are allowable only to the extent of \$2,000 plus capital gains)

(2) Total Gains and Losses (Enter net amount as Item 6) (Capital losses are allowable only to the extent of \$2,000 plus capital gains)

SCHEDULE D—INCOME FROM DIVIDENDS

1. Name of Dividend received during the year, stating accounts and names and addresses of corporations declaring the dividend:

2. John A. McCandless & Co., Ltd.

Schedule attached

SCHEDULE E—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 10, 11, 12, 13, 14, AND 15

1. Dividend excise tax, \$400.19

2. Income commissions, \$4044.25

3. Professional services, 2924.00

4. Traveling expenses, 1859.36

5. Sundries, 22.92

6. \$8551.50

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. Name of Property	2. Date Acquired	3. Date Sold	4. Gross Sales Price	5. Cost or Other Basis	6. Capital Gain or Loss	7. Taxable Capital Gain or Loss
1. Name of Property	2. Date Acquired	3. Date Sold	4. Gross Sales Price	5. Cost or Other Basis	6. Capital Gain or Loss	7. Taxable Capital Gain or Loss
8. Name of Property	9. Date Acquired	10. Date Sold	11. Gross Sales Price	12. Cost or Other Basis	13. Capital Gain or Loss	14. Taxable Capital Gain or Loss
15. Name of Property	16. Date Acquired	17. Date Sold	18. Gross Sales Price	19. Cost or Other Basis	20. Capital Gain or Loss	21. Taxable Capital Gain or Loss
22. Name of Property	23. Date Acquired	24. Date Sold	25. Gross Sales Price	26. Cost or Other Basis	27. Capital Gain or Loss	28. Taxable Capital Gain or Loss
29. Name of Property	30. Date Acquired	31. Date Sold	32. Gross Sales Price	33. Cost or Other Basis	34. Capital Gain or Loss	35. Taxable Capital Gain or Loss
36. Name of Property	37. Date Acquired	38. Date Sold	39. Gross Sales Price	40. Cost or Other Basis	41. Capital Gain or Loss	42. Taxable Capital Gain or Loss
43. Name of Property	44. Date Acquired	45. Date Sold	46. Gross Sales Price	47. Cost or Other Basis	48. Capital Gain or Loss	49. Taxable Capital Gain or Loss
50. Name of Property	51. Date Acquired	52. Date Sold	53. Gross Sales Price	54. Cost or Other Basis	55. Capital Gain or Loss	56. Taxable Capital Gain or Loss
57. Name of Property	58. Date Acquired	59. Date Sold	60. Gross Sales Price	61. Cost or Other Basis	62. Capital Gain or Loss	63. Taxable Capital Gain or Loss
64. Name of Property	65. Date Acquired	66. Date Sold	67. Gross Sales Price	68. Cost or Other Basis	69. Capital Gain or Loss	70. Taxable Capital Gain or Loss
71. Name of Property	72. Date Acquired	73. Date Sold	74. Gross Sales Price	75. Cost or Other Basis	76. Capital Gain or Loss	77. Taxable Capital Gain or Loss
78. Name of Property	79. Date Acquired	80. Date Sold	81. Gross Sales Price	82. Cost or Other Basis	83. Capital Gain or Loss	84. Taxable Capital Gain or Loss
85. Name of Property	86. Date Acquired	87. Date Sold	88. Gross Sales Price	89. Cost or Other Basis	90. Capital Gain or Loss	91. Taxable Capital Gain or Loss
92. Name of Property	93. Date Acquired	94. Date Sold	95. Gross Sales Price	96. Cost or Other Basis	97. Capital Gain or Loss	98. Taxable Capital Gain or Loss
99. Name of Property	100. Date Acquired	101. Date Sold	102. Gross Sales Price	103. Cost or Other Basis	104. Capital Gain or Loss	105. Taxable Capital Gain or Loss

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC. CLAIMED IN SCHEDULE A AND IN ITEM 12

1. Name of Property	2. Date Acquired	3. Date Sold	4. Gross Sales Price	5. Cost or Other Basis	6. Capital Gain or Loss	7. Taxable Capital Gain or Loss
1. Name of Property	2. Date Acquired	3. Date Sold	4. Gross Sales Price	5. Cost or Other Basis	6. Capital Gain or Loss	7. Taxable Capital Gain or Loss
8. Name of Property	9. Date Acquired	10. Date Sold	11. Gross Sales Price	12. Cost or Other Basis	13. Capital Gain or Loss	14. Taxable Capital Gain or Loss
15. Name of Property	16. Date Acquired	17. Date Sold	18. Gross Sales Price	19. Cost or Other Basis	20. Capital Gain or Loss	21. Taxable Capital Gain or Loss
22. Name of Property	23. Date Acquired	24. Date Sold	25. Gross Sales Price	26. Cost or Other Basis	27. Capital Gain or Loss	28. Taxable Capital Gain or Loss
29. Name of Property	30. Date Acquired	31. Date Sold	32. Gross Sales Price	33. Cost or Other Basis	34. Capital Gain or Loss	35. Taxable Capital Gain or Loss
36. Name of Property	37. Date Acquired	38. Date Sold	39. Gross Sales Price	40. Cost or Other Basis	41. Capital Gain or Loss	42. Taxable Capital Gain or Loss
43. Name of Property	44. Date Acquired	45. Date Sold	46. Gross Sales Price	47. Cost or Other Basis	48. Capital Gain or Loss	49. Taxable Capital Gain or Loss
50. Name of Property	51. Date Acquired	52. Date Sold	53. Gross Sales Price	54. Cost or Other Basis	55. Capital Gain or Loss	56. Taxable Capital Gain or Loss
57. Name of Property	58. Date Acquired	59. Date Sold	60. Gross Sales Price	61. Cost or Other Basis	62. Capital Gain or Loss	63. Taxable Capital Gain or Loss
64. Name of Property	65. Date Acquired	66. Date Sold	67. Gross Sales Price	68. Cost or Other Basis	69. Capital Gain or Loss	70. Taxable Capital Gain or Loss
71. Name of Property	72. Date Acquired	73. Date Sold	74. Gross Sales Price	75. Cost or Other Basis	76. Capital Gain or Loss	77. Taxable Capital Gain or Loss
78. Name of Property	79. Date Acquired	80. Date Sold	81. Gross Sales Price	82. Cost or Other Basis	83. Capital Gain or Loss	84. Taxable Capital Gain or Loss
85. Name of Property	86. Date Acquired	87. Date Sold	88. Gross Sales Price	89. Cost or Other Basis	90. Capital Gain or Loss	91. Taxable Capital Gain or Loss
92. Name of Property	93. Date Acquired	94. Date Sold	95. Gross Sales Price	96. Cost or Other Basis	97. Capital Gain or Loss	98. Taxable Capital Gain or Loss
99. Name of Property	100. Date Acquired	101. Date Sold	102. Gross Sales Price	103. Cost or Other Basis	104. Capital Gain or Loss	105. Taxable Capital Gain or Loss

AFFIDAVIT (See Instruction 25)

I swear (or affirm) that this return (including its accompanying schedule and statements, if any) has been examined by me, and, to the best of my knowledge and belief, is a true, correct, and complete return, made in good faith for the accounting period stated, pursuant to the Revenue Act of 1934 and the Regulations thereunder.

Subscribed and sworn to before me this 15th day of Feb 1935

Paul S. Henry

AFFIDAVIT (See Instruction 25)

I swear (or affirm) that I have prepared this return for the person named herein and that the return (including its accompanying schedule and statements, if any) is a true, correct, and complete statement of all the information respecting the income tax liability of the person for whom this return has been prepared of which I have any knowledge.

Subscribed and sworn to before me this 15th day of Feb 1935

(Petitioner's Exhibit No. 4 continued)

ESTATE OF JOHN A. McCANDLESS, DECEASED.

1935-36

Dividends

	Taxable	Exempt
Honolulu, T. H.		
Alexander & Baldwin, Ltd.....	\$ 2,000.00	
Bank of Hawaii.....	1,524.00	
Bishop Trust Co., Ltd.....	31.25	
C. Brewer & Co., Ltd.....	3,672.00	
Ewa Plantation Co., Ltd.....	1,200.00	
Home Insurance Co. of Hawaii, Ltd.	1,800.00	
Inter-Island Steam Navigation Co., Ltd.	2,380.00	
John A. McCandless & Co., Ltd.		
Distributed		\$49,111.20*
Undistributed (Section 351).....		4,058.00
McCandless Building Co., Ltd.....	2,188.80	
Oahu Sugar Co., Ltd.....	7,750.00	
Pioneer Mill Co., Ltd.....	7,667.00	
Waialua Agricultural Co., Ltd.....	720.00	
San Francisco, Calif.		
Pacific Gas & Electric Co.....	99.04	
	<hr/>	<hr/>
	\$31,032.09	\$53,169.20

*Paid out of capital; see statement attached.

[47]

JOHN A. McCANDLESS & COMPANY, LIMITED

Form 1096

1935

Surplus

12/31/30, balance	\$185,280.70	
1931 net income, deficiency letter, 6/21/35, IT:		
AR:E-7-8, RTM-60D		292,874.19
Dividends received		201,608.70
		<hr/>
		679,763.59
Deduct Dividends paid, 1931.....	\$129,324.37	
Undistributed income re		
104(d)	331,537.70	
Federal income tax.....	20,957.78	481,819.85
	<hr/>	<hr/>

12/31/31, balance,		197,943.74
Net loss, 1932, as finally determined by Commissioner		194,248.21
		<hr/>
		3,695.53
Dividends received		78,700.00
		<hr/>
		82,395.53
Deduct Dividends paid	47,841.00	
Federal income tax	27,540.38	75,381.38
		<hr/>
12/31/32, balance		7,014.15
Net loss, 1933, per return (short form RAR)		100,211.17
		<hr/>
		93,197.02
Dividends received	73,613.78	
Refund Federal income tax	5,889.31	79,503.09
		<hr/>
		13,693.93
Deduct dividends paid		80,166.00
		<hr/>
12/31/33, deficiency		93,859.93
Net loss, 1934, per return		9,537.31
Excess of stock loss over amount de- ductible in return \$5,294.79—\$2,000.00		3,294.79
		<hr/>
		106,692.03
Dividends received		49,463.57
		<hr/>
		57,228.46
Deduct dividends paid		42,669.00
		<hr/>
12/31/34, deficiency,		99,879.46
Net profit, 1935, per return		3,476.14
Dividends received		63,494.18
Liquidating dividend, 1934		21.00
		<hr/>
		32,906.14
Deduct dividends paid		49,134.00
		<hr/>
12/31/35, deficiency		\$ 82,040.14

PETITIONER'S EXHIBIT NO. 5

Know All Men by These Presents:

That I, John A. McCandless, whose domicile and legal residence is Honolulu, City and County of Honolulu, Territory of Hawaii, being of sound and disposing mind and memory and not in anywise acting under any undue influence, duress, menace or fraud exerted toward me whatsoever, do hereby make, publish and declare this my Last Will and Testament, hereby revoking all other wills or codicils by me heretofore made.

First: I direct my Executor to pay all of the expenses incident to my last illness, funeral and testamentary expenses, and all of my just debts.

Second: I direct my Executor to pay to my wife, Stella Hymson McCandless, the sum of One Thousand Dollars (\$1,000.00) per month for her support and maintenance during the administration of my estate, the first of such payments to be made one (1) month from the date of my death and succeeding payments of like amount to be made on the same day of each succeeding month until such time as my residuary estate has been distributed to my Trustee.

Third: I direct my Executor to pay the sum of Two Hundred Fifty Dollars (\$250.00) per month to each of my grandchildren, James C. McCandless, John McCandless Hepburn, Ella Margaret Hepburn and Frances Madge Hepburn, for their respective support, maintenance and education during the administration of my estate, the first of such payments

to be made one (1) month from the date of my death, and succeeding payments of like amount to be made on the same day of each succeeding month until such time as my residuary estate has been distributed to my Trustee. During the period of time that any of my said grandchildren are minors such monthly payments shall be made by payment to the [(Sgnd) JOHN A. McCANDLESS] [49] natural guardian of such minor grandchild, and the receipt of such natural guardian shall be a sufficient receipt, release and discharge to my said Executor.

Fourth: I give and bequeath the sum of Ten Thousand Dollars (\$10,000.00) to each of the following persons: to my nephew R. Lee Barnes, of Ellensburg, Washington; to my niece Mary O'Brien Hardigg, whose mother's home is Parkersburg, West Virginia; to Mary Ann Pettigrew, the daughter of Evelyn O'Brien, deceased, of Parkersburg, West Virginia; to my sister Anna O'Brien, of Parkersburg, West Virginia; and to my gardener Victor Jacks, provided, however, as a condition to said bequest to Victor Jacks that he is still in my employ at the time of my death.

Fifth: I give and bequeath the sum of Ten Thousand Dollars (\$10,000.00) to each of the following persons: to my brother James S. McCandless; to my brother Lincoln Loy McCandless; to my son-in-law H. M. Hepburn; to Mrs. H. M. Hepburn, wife of H. M. Hepburn; to Jessica McCandless, wife of my brother Frank McCandless, of Tacoma, Wash-

ington; and to Marion Rodolph Ghiradelli, widow of my deceased son.

Sixth: I give and bequeath unto The Imperial Council of the Ancient Arabic Order of the Nobles of the Mystic Shrine for North America, a Corporation owning, operating and conducting the "Shriners' Hospitals for Crippled Children", the sum of One Hundred Thousand Dollars (\$100,000.00), to be invested in such securities as directed by the Board of Trustees of the Shriners' Hospitals, or their successors in office, the income of which shall be used for the operation and maintenance of the "Shriners' Hospitals for Crippled Children".

Seventh: I give, devise and bequeath to my wife, Stella Hymson McCandless in fee simple our home, being the house and lot on Thurston Avenue, Honolulu, and described in Owner's Transfer Certificate of Title No. 388 issued to me, John A. McCandless, together with all household furniture, stores, furnishings, fixtures, [(Sgnd) JOHN A. McCANDLESS] [50] plate, china, linen, paintings, books, statuary, works of art and other articles of household or domestic use or ornament situate thereon or therein.

Eighth: I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal or mixed, wheresoever situated and of every kind or nature, and any property over which I shall possess any power of appointment, to Bishop Trust Company, Limited, an Hawaiian corporation, in trust for the uses and purposes and with the powers as hereinafter stated, that is to say:

(a) My said Trustee shall receive, hold, manage and control my said trust estate, collect the income therefrom and pay all charges incident to trust estates and properly payable by my said trust estate therefrom, and I authorize my Trustee to retain, either permanently or temporarily or for such period as to it may seem expedient, any investment made or property held by me, of whatever nature, and I direct that my said Trustee and Advisors to my Trustee hereinafter mentioned shall not be held liable for any loss resulting to my trust estate by reason of my Trustee retaining any such investment or property, or by reason of my trustee making or keeping any investment authorized to be made in this my Will, or for any error of judgment in this respect.

(b) I authorize and empower my Trustee to sell at public or private sale, partition, exchange or otherwise dispose of the whole or any part of the real estate which may be from time to time a part of my trust estate, with power to accept any purchase money mortgage or mortgages for any part of the purchase or exchange price; also to lease or let for any term of months or years, alter, repair or improve or develop the same or any part of the same, or otherwise provide for the use or employment of the same as to it may seem for the best interests of my said trust estate, any [(Sgnd) JOHN A. McCANDLESS] [51] such lease to be valid for the full term thereof notwithstanding that the trust herein created may sooner terminate, and

all this upon such terms, agreements, contracts or conditions and for such consideration as to my Trustee and the two Advisors hereinafter mentioned shall seem fit and proper, and all of these powers shall be exercised by my Trustee without the necessity of my Trustee receiving the approval or order of any court or courts authorizing the same; but these powers shall only be exercised by my Trustee when the transaction contemplated has been agreed to in writing or by cable by my Trustee and by the two Advisors to my Trustee mentioned in paragraph "Ninth" herein.

(c) I authorize and empower my Trustee to sell, lease, transfer or exchange any mixed property or personal property, (except capital stock of John A. McCandless & Company, Limited,) which from time to time may be a part of my said trust estate, and to invest the proceeds of any property, real, personal or mixed, and also any unapplied income of my said trust estate, and to reinvest the same, and in investing and reinvesting any proceeds, money or unapplied income of my said trust estate, my said Trustee shall invest the same (except for the mortgage or mortgages provided in (b) above as receivable as part of the sale price of real estate, but the proceeds of any such mortgage shall be invested as provided in this sub-paragraph (c) in common stocks of corporations and/or in United States Government bonds and/or in official bonds of the Territory of Hawaii, but I direct that my Trustee shall not acquire by purchase additional

sugar stocks as I feel that my trust estate will commence with sufficient ownership of that class of investments; my Trustee shall also have power to sell and dispose [(Sgnd) JOHN A. McCANDLESS] [52] of any stocks of corporations, bonds or other personal or mixed property which may be a part of my said trust estate from time to time, but in investing or in reinvesting the proceeds thereof my Trustee shall purchase securities of the classes hereinbefore mentioned in this sub-paragraph (c) for purchase; and all this upon such terms, agreements, contracts or conditions and for such consideration as to my Trustee and the two Advisors herein mentioned shall seem fit and proper, and all of the powers given my Trustee in this sub-paragraph (c) shall be exercised by my Trustee without the necessity of my Trustee receiving the approval or order of any court or courts authorizing the same. My said Trustee shall have the right and power to vote either directly or by proxy the stock of any corporation that may be a part of my said trust estate from time to time at all meetings of stockholders as it may deem best, but my said Trustee shall not buy, sell, lease or exchange any personal property or mixed property belonging to my trust estate unless the transaction contemplated had been agreed to in writing or by cable by my Trustee and by the two Advisors to my Trustee mentioned in paragraph "Ninth" herein.

(d) I direct that all stock dividends upon any stock owned by my said trust estate shall be con-

sidered and treated as capital and not as income of my said trust estate, and aside from the foregoing exception I give to my Trustee full power and authority to determine in doubtful cases what property or moneys received by it as my Trustee is capital and what is income, and all beneficiaries shall be bound by the decision and determination of my Trustee in regard to such allocation between capital and income. [(Sgnd) JOHN A. McCANDLESS] [53]

(e) My said Trustee shall pay and deliver from the accumulations and net income of my said trust estate, the sum of One Thousand Dollars (\$1,000.00) per month to my wife, Stella Hymson McCandless, the first of such payments to be made one month after the last monthly payment of One Thousand Dollars (\$1,000.00) is made by my Executor to my said wife in accordance with the provisions of paragraph "Second" herein, and succeeding payments of like amount to be made to my said wife on the same day of the month of each succeeding month, until my eldest grandchild, John McCandless Hepburn, shall attain the age of twenty-one (21) years, or if he shall die before attaining such age, then until the time he would have attained the age of twenty-one (21) years if living, and at such time the payment of One Thousand Dollars (\$1,000.00) per month to my said wife hereinbefore provided shall cease and determine, and from and after such time I direct my trustee to pay to my said wife Stella Hymson McCandless one tenth (1/10) of the

annual net income thereafter received in my said trust estate, in quarterly payments or oftener, from time to time, as in the sole discretion of my trustee shall seem best.

(f) My said Trustee shall pay and deliver from the accumulations and net income of my said trust estate, the sum of Two Hundred Fifty Dollars (\$250.00) per month to each of my said four (4) grandchildren, James C. McCandless, John McCandless Hepburn, Ella Margaret Hepburn and Francis Madge Hepburn, the first of such payments to be made one (1) month after the last monthly payment of Two Hundred Fifty Dollars (\$250.00) is made by my Executor to my said grandchildren in accordance with the provisions of paragraph "Third" herein and succeeding payments of like amount to be made on the same day of each succeeding month, and such payments shall continue [(Sgnd) JOHN A. McCANDLESS] [54] to each such named grandchild until such grandchild shall attain the age of twenty-one (21) years, and all such monthly payments shall be made by payment to the natural guardian of such minor grandchild, and the receipt of such natural guardian shall be a sufficient receipt, release and discharge to my said Trustee. As my said grandchildren attain the age of twenty-one (21) years the payment of Two Hundred Fifty Dollars (\$250.00) per month to said grandchild attaining the age of twenty-one (21) years shall cease and determine, and from and after such time I direct my Trustee to pay to each said

grandchild from and after his or her attaining the age of twenty-one (21) years one-tenth (1/10) of the annual net income thereafter received in my said trust estate, in quarterly payments or oftener from time to time as in the sole discretion of my Trustee shall seem best. If any of my said grandchildren shall die before the termination of this trust, leaving issue surviving, then and in such event such issue shall be paid the monthly payments and the share of the net income to which his or her parent would have been entitled if such parent were living. If any of my said grandchildren shall die before the termination of this trust, leaving no issue surviving, then and in such event my said wife and the survivors of my said grandchildren and the issue, if any, of my said grandchildren who are then dead (such issue, however, taking the share his or her parent would have been entitled to if living) shall be paid in equal shares, the monthly payments and the share of the net income to which said grandchild deceased without issue would have been entitled if surviving. [(Sgnd) JOHN A. McCANDLESS] [55]

(g) In the event of any emergency arising, whether from illness, necessity for hospital or surgical care, or any other emergency of any kind or sort which my said Trustee in its sole discretion may consider vitally affecting the welfare of my said wife or all or any of my said grandchildren, or if my said Trustee shall decide that it is necessary or useful to provide for further education for any

or all of my said grandchildren, then and in any such event, and as often as the same shall occur, my said Trustee is hereby authorized to pay out of the accumulation and income of my said trust estate a larger sum than One Thousand Dollars (\$1,000.00) per month to my wife, Stella Hymson McCandless, or a larger sum than Two Hundred Fifty Dollars (\$250.00) per month to any or all of my said grandchildren, as the case may be, in order to suitably provide for any such emergency or condition, and the decision of my said Trustee as to the existence of such emergency or condition, and the necessity for an additional payment and the additional amount to be paid, if any, from time to time, and the time for the continuance of any such additional payment or payments shall be final. It being my intent and desire by this provision to authorize my Trustee to provide for any emergency or condition affecting the welfare of my said wife or any or all of my said grandchildren by providing additional payments if, as and when in the sole discretion of my said Trustee said additional payments are necessary or desirable in view of the circumstances then existing. Any additional payments so made by my said Trustee to provide for any such emergency or condition shall not be chargeable against the interest in my said trust estate of the beneficiary or beneficiaries for whom said additional payment or payments are made, but any and all such payment or payments shall be treated as

ordinary expenses of [(Sgnd) JOHN A. McCANDLESS] [56] my said trust estate.

(h) Any of the net income of my said trust estate which is not paid out to the beneficiaries from time to time during the continuance of the trust in accordance with the terms of my Will shall be retained in my said trust estate and the same shall be invested and reinvested and accumulated until this trust shall terminate.

(i) When the youngest of my said grandchildren shall attain the age of thirty (30) years, or in the event that my said youngest grandchild shall die before attaining such age, then at such time as my said youngest grandchild would, if living, attain the age of thirty (30) years this trust shall cease and determine and my Trustee shall thereupon transfer and deliver all of my said trust estate (that is, the capital thereof with all accumulations of income as invested or reinvested, and any other undistributed income and all the assets of every kind and sort then a part of my said trust estate) free and clear from any trust, in equal shares, that is one-fifth ($1/5$) each, to my wife, Stella Hymson McCandless, and my said four grandchildren, James C. McCandless (posthumous child of my son James Crystal McCandless, born of his wife Marion, now the wife of Louis Ghiradelli), John McCandless Hepburn, Ella Margaret Hepburn and Frances Madge Hepburn, but, should any of my said four grandchildren die prior to the termination of this trust, leaving issue surviving at the time of distribu-

tion, the share of my said trust estate provided to be distributed to any such deceased grandchild shall go to and be distributed to the issue then surviving of said grandchild, such share to be equally divided between such issue per stirpes and not per capita. [(Sgnd) JOHN A. McCANDLESS] [57] Should any of my said four grandchildren die prior to the termination of this trust, leaving no issue surviving at the date of termination of this trust, then the share of my said trust estate provided to be distributed to any such grandchild shall go to and be distributed to my said wife, if she be then surviving, and to each of the survivors of said grandchildren, and to the issue who are then surviving of any said deceased grandchild (such issue, however, to take only the share to which his or her parent would have been entitled had such parent been surviving at the date of distribution, and such share to be equally divided between such issue, per stirpes and not per capita) in equal shares.

If my said wife, Stella Hymson McCandless, be not living at the termination of this trust, or in the event that she shall not be entitled to take under my Will as provided in paragraph "Tenth" hereof, then and in any of such events, my said trust estate shall be distributed to each of the survivors of my said four grandchildren and to the issue surviving at the time of distribution, of any of my said grandchildren who have died prior to the time of distribution, (such issue who are then surviving of any said deceased grandchild to take only the

share to which his or her parent would have been entitled had such parent been surviving at the date of distribution, and such share to be equally divided between such issue, per stirpes and not per capita) in equal shares.

Ninth: I hereby appoint as Advisors to my Trustee and as Advisors to my Executor under this Will John L. McNabb, of San Francisco, California, and Urban E. Wild, of Honolulu, Territory of Hawaii, for the purpose of consultation with my Trustee and with my Executor in regard to the buying and [(Sgnd) JOHN A. McCANDLESS] [58] selling of securities and other property belonging to my estate or belonging to my trust estate, and I direct that no securities or other personal property or mixed property shall be either purchased, sold and/or exchanged by my Executor or by my Trustee, and no real estate shall be sold, exchanged or leased by my Executor or by my Trustee without the unanimous consent of said Advisors or their successors.

This provision I insert as a check on hasty or inconsiderate sales or investments, and the authority of said Trustee and of said Executor is general and complete under this Will save with respect to this limited power of consultation and agreement by the said two Advisors named in this Will.

In the event of the death or refusal to act of either of the foregoing Advisors named in this paragraph, or their successors, I direct that the successor or successors to such Advisor shall be such

qualified person as is selected and designated in writing as Advisor by the then Chief Justice of the Supreme Court of the Territory of Hawaii, and upon such designation of a successor, the equity court having jurisdiction of my trust estate shall by formal order appoint the person so selected and designated as Advisor hereunder. My Advisors shall be entitled to receive adequate and full compensation so as to be warranted in giving careful and adequate time, attention and study to the same, and such compensation shall be an expense of my estate or trust estate as the case may be and chargeable to income.

Tenth: I have in this my Last Will and Testament made provision for various payment from and bequests or devises and interests in my estate and in my said trust estate [(Sgnd) JOHN A. McCANDLESS] [59] to my wife, Stella Hymson McCandless. I have every reason to believe that our life will be, as now, affectionate and harmonious. But knowing the occasional uncertainties of married life, I make every bequest and provision in my Will for her benefit conditional on the fact that my said wife and I are at the time of my death married and living together as husband and wife, but should we, at the time of my death, be separated or not be living together as husband and wife, then any rights and interests given by this my Last Will and Testament to my said wife shall not take effect but shall be void and of no effect, and in any of such events my said wife, Stella Hymson McCandless, shall take nothing under this Last Will and Testament.

Eleventh: I hereby appoint my personal attorneys, John L. McNabb and Urban E. Wild, attorneys for my Trustee and Executor herein named, and direct that such Trustee and Executor employ my said attorneys to act as attorneys for the Trustee and Executor of my estate.

Twelfth: I hereby nominate and appoint Bishop Trust Company, Limited, an Hawaiian corporation, Executor of this my Last Will and Testament, and I direct that no bond shall be required from said Bishop Trust Company, Limited, either as Trustee or as Executor hereunder.

Thirteenth: My Executor shall in its discretion be empowered to keep open the administration of my estate for such length of time as may seem necessary to my Executor to best protect the interests of my estate. It is my express desire that no part of my estate shall be sacrificed because of the sale of assets thereof at an inopportune time in order to pay debts or expenses of administration or duties or taxes or any other charge or claim against my estate. My executor is hereby authorized to pay all legacy, inheritance, transfer [(Sgnd) JOHN A. McCANDLESS] [60] or other duties or taxes upon my estate or upon any interest in my estate from the income from my estate and/or from the capital thereof or partially from income and partially from capital thereof, which shall seem to my said Executor to be to the best interests of my estate as a whole.

My Executor is hereby given the express power to sell real estate of my estate or lease or let the same if such course is deemed advisable by my Executor before selling any personal property of my estate. My Executor shall make no sale or lease of real estate or securities or other personal property, however, without the agreement and consent in writing or by cable of the two Advisors to my Executor herein mentioned in paragraph "Ninth". I hereby authorize my Executor to borrow money from time to time upon the security of any of the assets of my said estate for the purpose of securing the necessary funds with which to pay any such legacy, inheritance, transfer or other duties or taxes upon my estate or upon any interest in my estate, or to pay debts of my estate or to pay any other charges against my estate or for the purpose of financing my estate for any other reason, if it shall seem necessary or advisable to my Executor so to do. If any such money is so borrowed I authorize my Executor to repay the same either from income or from capital or partially from income and partially from capital as to my said Executor shall seem best under the circumstances.

Fourteenth: I direct that the bequests made in paragraph Fourth, Fifth and Sixth of this Will are to be paid to the various legatees as soon as my Executor shall be able so [(Sgnd) JOHN A. McCANDLESS] [61] to do without embarrassment to my said estate, having due consideration to the many payments required for inheritance taxes, es-

tate taxes, etc., and for debts and charges and for other purposes, and I further direct that none of said bequests shall draw interest, and that when paid each of said bequests shall be paid in full by payment of the net amount herein *bequeated* in each case.

Fifteenth: I hereby declare that I am, at the time of making this Will, married to Stella Hymson McCandless, by whom I have no children at this time; that I am and have been the father of three children and no more, by a former marriage, to-wit, a son Charles, who died in infancy and is buried in the Thompson family lot at Parkersburg, West Virginia, a son, James Crystal McCandless, and a daughter, Frances Madge Hepburn; those three children and my former wife, Ella T. McCandless, mother of said children, are all dead.

I further declare that I have no other children and never have had any other children than the three children herein named, and my nearest descendants are my said four grandchildren named in this Will. I make this statement in view of the fraudulent claims which are so frequently advanced after death against the estates of men of wealth. Any claim by any other person to be a child or grandchild of mine, (unless a child shall be hereafter born of my present marriage,) would be false and fraudulent, and as a matter of protection to my estate and to nullify any fraud which might be attempted against my estate, as has been attempted against other estates, I hereby devise and

bequeath to any other person claiming to [(Sgnd) JOHN A. McCANDLESS] [62] be such child or grandchild of mine, who shall assert and prove the relationship of child or grandchild, the sum of Ten Dollars (\$10.00) and no more.

Sixteenth: I hereby will and direct that any heir, legatee, devisee or person interested in my estate who shall bring any contest, direct or indirect, against this Will, either in whole or in part, or who shall oppose the probate of this Will, or who shall, directly or indirectly, seek to revoke its probate, shall thereby forfeit any bequest made or interest given to such person, and I hereby expressly revoke any bequest made or other interest given to any heir, legatee, devisee or other interested person who shall take any such step in opposition to this Will or any part thereof.

Seventeenth: It is my wish that John A. McCandless & Company, Limited, shall continue to be an active and growing corporation for the benefit of my beneficiaries; that as the administration of my estate and of this trust permit, the assets of the trust be conveyed or loaned from time to time, if that seems advisable, to the John A. McCandless & Company, Limited, to the end that when this trust shall terminate, my beneficiaries shall receive, as nearly as may be, as their shares of the estate, holdings of the corporate stock of the John A. McCandless & Company, Limited. This I do to the end that my beneficiaries will become owners of interests in an active and growing corporation. And to this end,

it is my wish that no stock of the John A. McCandless & Company, Limited, shall be sold, unless necessary to protect my estate, but that that Company shall become the medium through which my estate will be distributed to my beneficiaries. [(Sgnd) JOHN A. McCANDLESS] [63]

In witness whereof I have hereunto set my hand and seal at Honolulu, T. H., this 19th day of February, A. D. 1929.

(Seal) (Signed) JOHN A. McCANDLESS

Signed, sealed, published and declared by the said John A. McCandless, as and for his last Will and Testament in the presence of us, being present at the same time, who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses this 19th day of February, A. D. 1929.

(Signed) ARTHUR G. SMITH

Honolulu, T. H.

(Signed) FRIEDA H. ROBERT

Honolulu, T. H.

(Signed) SHIGEO KUSUMOTO,

Honolulu, T. H.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office.

(Seal) W. H. TILLY

Clerk, Circuit Court, First
Circuit, Territory of Hawaii

[Endorsed]: Petitioner's Exhibit No. 5. Admitted in evidence May 2, 1940. [64]

PETITIONER'S EXHIBIT NO. 6

In the Circuit Court of the First Judicial Circuit
Territory of Hawaii

P. No. 8077

In Probate

At Chambers

In the Matter of the Estate of JOHN A. McCANDLESS,

Deceased.

ORDER APPROVING ACCOUNTS, DETERMINING TRUST AND DISTRIBUTING ESTATE [65]

Whereas, Bishop Trust Company, Limited, as Executor of the Will of John A. McCandless, Deceased, did on the 12th day of January, A.D. 1935, file in the Court a Petition showing that on the 4th day of March, A.D. 1930, Letters Testamentary were duly issued to it out of and under the seal of the above entitled Court; that at all times since that time said Bishop Trust Company, Limited has been the duly qualified and acting Executor of the Last Will and Testament of John A. McCandless, Deceased; that notice to creditors of said Estate was duly made by publication in the Honolulu Star-Bulletin, a newspaper printed and published in Honolulu, T. H., for each of four (4) successive weeks (5 insertions), the first of such publications being on the 5th day of March, A.D. 1930, and that more than four (4) months have elapsed since the

first publication of said notice to creditors; that on the 24th day of May, A.D. 1930, that being within the time as extended by orders of the above entitled Court in the above entitled cause, was [66] filed a sworn inventory of all of the property and assets of every kind and nature situate in the Territory of Hawaii belonging to the above entitled Estate; that as such Executor, it has collected all sums of money known or believed to be due and collectible for said Estate; that as such Executor, it has paid all just claims against and debts of said Estate, but that said Executor had not at that time fully paid Executor's statutory commissions, expenses of administration, attorneys' fees and a claim for an additional estate tax now pending; that all the duties required by law or orders of this Court, or which a faithful and prudent appointee should do, have been performed; that on Schedules marked "A", "B" and "C", respectively, and made a part of said Petition, are shown true, full and exact statements of the receipts and expenditures for the period from February 4, 1930 to and including December 13, 1934, and an exact summary thereof; that on Schedule marked "D" and made a part of the Petition, is shown a true, full and exact statement of the remainder of the property belonging to said estate on said December 13, 1934; that Schedule "B" of said accounts shows the payment of all legacies contained in the Will of John A. McCandless, Deceased; said Petition further showed that in addition to the amounts of commission shown as paid on Sched-

ule "B" of said account, Bishop Trust Company, Limited, as such Executor, was entitled to receive a statutory capital commission in the further amount of \$42,784.52; that Bishop Trust Company, Limited had paid all federal estate taxes and all territorial inheritance taxes chargeable against the Estate of the above named decedent, which were shown to be due and payable on the respective returns filed by said Executor; that in addition to the federal estate tax heretofore [67] paid by said Executor, the United States Government has claimed an additional estate tax in the sum of \$21,819.90, and that Bishop Trust Company, Limited, as Executor of the Will of John A. McCandless, Deceased, has contested the payment of said additional tax and as such Executor has perfected an appeal to the United States Board of Tax Appeals for the purpose of determining what amount, if any, is due and payable as an additional estate tax; that Bishop Trust Company, Limited is the Trustee of the Trust Estate created under and by virtue of the Will of said John A. McCandless, Deceased, and that said Petitioner prayed that the distribution of the assets of the residuary estate remaining in its hands as such Executor be made to Bishop Trust Company, Limited, as Trustee under the Will and of the Estate of John A. McCandless, Deceased, subject to the payment of any such additional amount as may be finally determined to be due and payable for federal estate taxes, and also subject to the pay-

ment of such other amount or amounts as may finally be determined to be due and payable on account of attorneys' fees and expenses in connection with said appeal and the settlement thereof, and subject to the payment of the Executor's commission upon capital; and that upon a day appointed for the hearing of the Petition, said account be examined and allowed and that an order be made to deliver over such property as remains to the persons thereto entitled; and that Petitioner be relieved from all further responsibilities as Executor under the Will and of the Estate of John A. McCandless, Deceased.

Order to Show Cause was made returnable on the 18th day of February, A.D. 1935, at two o'clock P.M. before this Court, at Chambers, in the Judiciary Building at Honolulu, T. H., which said order further required that notice of said [68] order be given by publication in the Honolulu Star-Bulletin once a week in each of four successive weeks; that the hearing on said Petition and Account has been continued from time to time by orders of this Court to January 15, 1936, and at that time was further continued to January 17, 1936 at the hour of nine o'clock A.M.; that the above entitled Court duly appointed W. R. Ounderkirk Master to examine and report on the First and Final Account of Bishop Trust Company, Limited, Executor of the Estate of John A. McCandless, Deceased, and that said Master duly made and filed his report in which he stated that he had carefully examined and checked

Schedule "A" of said Account, that being the accounting of all receipts received by the Executor, both of capital and income, and found the same correct and all receipts accounted for; that he had examined and checked Schedule "B" of said Account, that being *on* account of all disbursements made by the Executor, both of capital and income, and found all disbursements to be legally made and supported by vouchers, and called the Court's attention to the fact that the fixing of fee for attorneys must be decided by the Court. That the Master further found that all bequests and legacies had been paid in accordance with the terms of the Will of John A. McCandless and that all monthly payments directed by the Will to be made to certain beneficiaries have been made as directed; that Schedule "C", which is a summary of Schedules "A" and "B" is correct; that he had checked and examined the inventory of property in the hands of the Executor and found the same correct and all securities in the hands of the Executor. That the Master recommended that the Estate should be kept open for such length of time as might seem necessary to the Executor until such time as the Estate was in funds to [69] pay the balance of Executor's commissions, attorneys' fees, etc.

That on, to-wit, January 13, 1936, Bishop Trust Company, Limited, as such Executor, filed a Submission of Supplement to First and Final Account of Bishop Trust Company, Limited, Executor of the Will of John A. McCandless, Deceased, cover-

ing the period from and including December 14, 1934, to and including December 31, 1935; that on Schedules "A", "B" and "C", annexed to said Submission of Supplement to First and Final Account of Bishop Trust Company, Limited, Executor, is exhibited and shown a true, full and correct account of all receipts and expenditures made by, for and on behalf of said Estate for the period from and including December 14, 1934, to and including December 31, 1935, and also a summary thereof, and also on Schedule "D" is shown a true, full and correct inventory of all property remaining in its hands as Executor on December 31, 1935.

That on January 17, 1936, at nine o'clock A.M., the hearing on the said Petition and said First and Final Account and upon the Submission of Supplement to First and Final Account, and said Account for the period December 14, 1934 to December 31, 1935, came on for hearing before the above entitled Court, at Chambers, in Probate, in the Judiciary Building at Honolulu, T. H., at which time and place, upon due proof of the publication of said order of hearing in the manner and for the time therein specified and upon due proof that Bishop Trust Company, Limited has faithfully discharged the duties of its trust according to law and the orders of this Court, and that Schedules "A", "B" and "C" of First and Final Account of Bishop Trust Company, Limited, Executor of the Will of John A. McCandless, Deceased, are true and correct, which the [70] Court finds as a fact; and that

the inventory annexed thereto is correct as of December 13, 1934, which the Court finds to be a fact; and that Schedules "A", "B" and "C" of the Supplement to First and Final Account of Bishop Trust Company, Limited, Executor of the Will of John A. McCandless, Deceased, covering the period from and including December 14, 1934 to and including December 31, 1935 are true and correct statements of the receipts and expenditures during said period of time and of the respective balances thereof; and that the inventory, Schedule "D", annexed thereto is a true and correct inventory of the assets remaining in the hands of the Executor on December 31, 1935, all of which the Court finds as a fact; and the Court being advised in the premises and having considered the matter upon the record in the cause, the Master's report and the evidence adduced, the Court finds that each of the allegations of fact contained in said Petition is true; that said First and Final Account is true and correct in all particulars; that said Supplement to First and Final Account for the period from and including December 14, 1934, to and including December 31, 1935, is true and correct in all particulars; and that said First and Final Account and said Supplement to First and Final Account should each be allowed and approved; and that the inventories attached to each of said Accounts is a true and correct inventory of the assets remaining in the Estate of John A. McCandless, Deceased, as of the closing dates of said Accounts;

And it further appearing to the Court that the Estate has been administered most excellently and that it was necessary for the Executor to keep open the administration of the Estate for the full period of time that the same was open so that expenses of administration, etc. could be paid out [71] of income so as to avoid the injudicious sale of assets of the Estate at a time considered inadvisable by the Executor to make such sale; and the Court having considered the question of attorneys' fees to be allowed to John L. McNab of San Francisco, California, and Urban E. Wild, a member of the legal partnership of the firm of Smith, Wild, Beebe & Cades of Honolulu, T. H., the Attorneys for the Estate named as such in the will of John A. McCandless, deceased, and evidence having been adduced at the hearing concerning the amount to be awarded as an attorneys' fee, and the Court being advised in the premises;

And it appearing to the Court that said Accounts should be approved and allowed, that Bishop Trust Company, Limited should be ordered to transfer and deliver all property remaining in its hands as such Executor, after the payment of the amounts hereinafter mentioned, to Bishop Trust Company, Limited, Trustee under the Will and of the Estate of John A. McCandless, Deceased, subject to the payment of additional estate taxes and inheritance taxes, if any, and the probate estate should be finally closed;

And it being represented to the Court by Mr. Ernest K. Kai, representing the Treasurer of the Territory of Hawaii, that an additional inheritance tax is due and payable by the Estate in the sum of \$1,137.50, and it being impossible until this date to determine the amount of the additional inheritance tax because it depended upon the findings of this Honorable Court,

The Court finds, orders and decrees that the additional amount of \$1,137.50 is due and payable by the Estate to the Territory of Hawaii on account of additional inheritance [72] tax and that interest shall be paid to the Territory of Hawaii upon such additional tax at the rate of seven per cent (7%) per annum instead of at the rate of ten per cent (10%) per annum;

Now, therefore, it is hereby ordered, adjudged and decreed that said First and Final Account of Bishop Trust Company, Limited, Executor of the Will of John A. McCandless, Deceased, for the period from February 4, 1930, to and including December 13, 1934, and said Supplement to First and Final Account of Bishop Trust Company, Limited, Executor as aforesaid, covering the period from December 14, 1934, to December 31, 1935, be and the same are hereby approved, allowed and settled; and that said Bishop Trust Company, Limited be and it is hereby authorized, empowered, ordered and directed to forthwith deliver over to Bishop Trust Company, Limited Trustee under the Will and of

the Estate of John A. McCandless, Deceased, all properties and amounts of money remaining in its hands as such Executor, and that said property in the hands of such Trustee shall be subject as is provided by law to the claims of the United States Government for additional estate taxes, if any, and also additional income taxes, if any.

It is further ordered, adjudged and decreed after full hearing thereon, that John L. McNab of San Francisco, California, and Urban E. Wild and the firm of Smith, Wild, Beebe & Cades, of which he is a member, are hereby allowed an attorneys' fee in the sum of Seventy-Five Thousand Dollars (\$75,-

[73]

000.00), which the Court, from the evidence adduced, finds as a fact to be a very reasonable fee, and this fee includes not only services as Attorneys-at-Law but also compensation to the said John L. McNab and the said Urban E. Wild for acting as Advisors to the Executor of the Will of John A. McCandless, Deceased, in accordance with the provisions contained in said Will.

It is further ordered, adjudged and decreed that Bishop Trust Company, Limited, as such Executor, shall pay to John L. McNab the sum of \$920.00 for steamer fare for three round trips from San Francisco to Honolulu, which trips were made in connection with the the affairs of the Estate of John A. McCandless, Deceased, and were necessary expenses for which the said John L. McNab has not as yet been reimbursed, and that in addition, John L. Mc-

Nab be allowed his hotel expenses on his present trip to Honolulu.

It is further ordered, adjudged and decreed that Bishop Trust Company, Limited, shall forthwith upon the signing of this Order, convey, transfer and deliver to Bishop Trust Company, Limited, as Trustee under the Will and of the Estate of John A. McCandless, Deceased, the assets remaining in its hands as Executor aforesaid; and that upon the filing herein of due and proper vouchers showing the receipt by Bishop Trust Company, Limited, as Trustee under the Will and of the Estate of John A. McCandless, Deceased, of the assets remaining in the hands of Bishop Trust Company, Limited, as such Executor, Bishop Trust Company, Limited, be discharged from its trust as Executor of the Will of John A. McCandless, Deceased, in all particulars, except that Bishop Trust Company, Limited shall remain as such Executor for such time as may be [74] necessary to secure a substitution of itself, as Trustee as aforesaid, as Party-Petitioner in the two appeals before the United States Board of Tax Appeals against the Commissioner of Internal Revenue now pending, so that said appeals may be properly presented and settled; and when said substitution has been effectuated, then and upon the filing herein of a verified statement by such Executor showing the same, Bishop Trust Company, Limited shall be discharged as such Executor in such particulars without any further order being entered by the Court.

Dated: Honolulu, T. H., this 21st day of January, 1936.

N. D. GODBOLD (Sgd.)

Judge of the Circuit Court of the First Circuit.

Attest:

(Seal)

(S) JAMES K. TRASK

Clerk of the Circuit Court of the First Circuit.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office.

(Seal)

W. H. TILLY,

Clerk, Circuit Court, First District, Territory of Hawaii.

[Endorsed]: First Circuit Court, Territory of Hawaii. Filed Jan. 21 PM 302. James K. Trask, Clerk.

[Endorsed]: Petitioner's Exhibit No. 6. Admitted in evidence May 2, 1940. [75]

PETITIONER'S EXHIBIT NO. 7

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

P. No. 8077

At Chambers

In the matter of the Estate of John A. McCandless,
Deceased.

FINAL RECEIPT

Received from Bishop Trust Company, Limited,
Executor of the Will of John A. McCandless, De-

ceased, Probate No. 8077, First Judicial Circuit, Territory of Hawaii, the sum of Twenty Thousand Five Hundred Four and 58-100 Dollars (\$20,504.58) and the following property:

Real Property:

Northwesterly half of Lot #33, Section 5, Oahu Cemetery Association, Honolulu, T. H., area 300 sq. ft.

Personal Property:

Stocks:

McCandless Building Company..... 608 shares
Cert. No. 42

John A. McCandless & Company.....25848 shares
Cert. No. 49

Alexander & Baldwin Ltd..... 200 shares
Certs. Nos. 863 150 shares
864 50 “

Bank of Hawaii..... 153 shares
Cert. No. B273

Bishop Trust Company, Ltd..... 250 shares
Cert. No. C589

C. Brewer & Company, Ltd..... 216 shares
Cert. No. A1472

Home Finance Company..... 1200 shares
Cert. No. 120

Home Insurance Company..... 1000 shares
Cert. No. 424

Inter-Island Steam Navigation Co..... 1700 shares
Cert. No. 4560

[76]

Oahu Sugar Company..... 2500 shares

Certs. Nos. 22579 500 shares

22580 500 “

22581 500 “

22582 500 “

22611 500 “

People's Bank of Hilo	40 shares
Cert. No. 55	
Pioneer Mill Company.....	3740 shares
Certs. Nos. 14104 to 14108 incl. 14138, 14139 for 500 shares each & 15614 for 240 shares.	
Royal Hawaiian Coffee Co.,.....	25 shares
Cert. No. 10	
Waialua Agricultural Co.,.....	300 shares
Certs. Nos. H22526 200 shares H23095 100 “	
<hr/>	
Kona Tobacco Company.....	81 shares
Certs. Nos. 31 20 shares 55 41 “ 95 10 “ 125 10 “	
<hr/>	
Western Pacific Railway Co.,.....	1100 shares
Certs. Nos. 1943 to 1952 incl. for 100 shares ea. 1953 for 30 shares & #1959 for 70 shares.	
California Market Properties Co.....	100 shares
Cert. No. 23	
Pacific Wool Products Company.....	15000 shares
Certs. Nos. 5 5000 shares 25 2500 “ 32 7500 “	
<hr/>	
River Farms Company of California.....	1 shares
Cert. No. 347	
Pacific Gas & Electric Co.....	66 shares
Certs. Nos. F8704 5 shares F118315 6 “ F140829 55 “ Issued in name of — Bishop Trust Co., Ltd., Trustee under Will of J. A. McCandless.	

Bonds:

Republic of Mexico 5% 1945

Consolidated External Gold Loan of 1899

1/£200 Series "C" #038094 with coupon #13 Series 39
a.s.c.a.

26/£100 Series "D" #096892, 095827, \$95010, 094904,
094903, 052002, 092209, 092180, 087728, 086732,
085318, 084353, 071373, 068081, 066437, 063851,
063208, 061142, 058284, 056559, 055970, 049398,
048705, 048107, 044670, 043812 with coupon #13
[77]

Series 39 a.s.c.a.

60/£ 20 Series "E" #150661, 151001, 119827, 144333,
142835, 138808, 159548, 147789, 130987, 130145,
130144, 107295, 119644, 150663, 130138, 188360,
188002, 187089, 138327, 163706, 186067, 108856,
104391, 100731, 168418, 130069, 100265, 104263,
128243, 186209, 179892, 176558, 176557, 173614,
169614, 166020, 134603, 160092, 160447, 163170,
163244, 186064, 180247, 179899, 179896, 150879,
146161, 150816, 155829, 159880, 159948, 160091,
119052, 149190, 138056, 156374, 156371, 122136,
150662, 130877, with coupon #13 Series 39
a.s.c.a.

Receipt #76772 dated May 21, 1924 of Guaranty Trust
Co. of New York depositary United States of Mexico
for \$8487.51 for coupons or rights to interest in
arrears (Class "A")

Imperial Russian Government 5½% Series II War Loan
of 1916

5/5000 Roubles Nos. 008815, 008816, 008717, 008193,
008585 with coupon #8 a.s.c.a.

25/1000 Roubles Nos. 325831 to 325840 incl. 289321 to
289325 incl. 302681 to 302690 incl. with coupon #8
a.s.c.a.

Loose coupons #3-7 incl. of 50/1000 Roubles

Bonds #291195 to 291244 incl. same issue as above.

Miscellaneous:

3,117 1/10ths undivided interest in real property situate at ±432 California Street, San Francisco, California, and other remaining assets of Peirce Fair & Co. transferred to Harry H. Fair, Trustee in September 1933 for the benefit of the stockholders. This interest in lieu of 1 share Peirce Fair & Co., a dissolved corporation.

Jewelry:

- 1 Pair Cat's Eye Shell Cuff Buttons
- 1 " Masonic Cuff Buttons
- 1 Masonic Pendant
- 1 Bone Carving

Representing distribution of all of the assets of every kind and sort remaining in the Estate of John A. McCandless, deceased, in accordance with Paragraph Eighth of the Last Will and Testament of said John A. McCandless, Deceased, and pursuant to Order of the Honorable N. D. Godbold, Judge of the First Judicial Circuit, Territory of Hawaii, dated January 21, 1936.

Dated at Honolulu, T. H., this 22nd day of January, 1936.

BISHOP TRUST COMPANY, LIMITED,

By (S) J. K. CLARKE,

Its Vice President

By (S) E. BENNER JR.,

Its Assistant Secretary.

Trustee under the will and of the estate of John A. McCandless, Deceased.

Estate of John A. McCandless, Deceased

Estate of John A. McCandless, Deceased

Date	Character	Capital		Income		Balance
		Expenditures	Receipts	Expenditures	Receipts	
1945						
February						
	1 Balance					\$ 8,107.04
	Dividend				\$ 372.13	
	7 Radio	P. M. Co.	\$ 2.02			8,477.15
	13 Dividend	O. S. Co.			248.75	
	"	E. P. Co.			597.00	
	16 "	McC. B. Co.			181.49	
	"	I. I. Ins. Co.			99.50	
	21 Beneficiary			\$ 50.00*		
	25 Dividend	C. B. & Co.		500.00	214.92	
	27 Beneficiary			250.00		
	"			1,000.00		
	"			200.00*		
	28 "					7,818.81
March						
	Dividend	W. A. Co.			59.70	
	21 "	P. M. Co.			372.13	
	15 "	O. S. Co.			248.75	
	"	A. & B.			298.50	
	16 "	McC. B. Co.			181.49	
	"	H. Ins. Co.			99.50	
	21 S/D rental		3.30			9,075.58
	25 Dividend	C. B. & Co.			214.92	
	27 Master's fee		3,000.00		602.97	6,290.50
	28 Dividend	Bk. of H.			507.45	
	"	L. I. S. N. Co.				
	29 Beneficiary			1,000.00		
	"			250.00		
	"			500.00		
	"			250.00		5,400.92
April						
	1 Dividend	P. M. Co.			372.13	
	15 "	O. S. Co.			248.75	
	Federal income tax		3,074.69			2,947.11
	16 Dividend	H. Ins. Co.			99.50	
	"	McC. B. Co.			181.49	
	22 "	P. G. & E. Co. (e)			24.76	
	25 "	C. B. & Co.			214.92	
	29 Beneficiary			1,000.00		
	"			250.00		
	"			250.00		
	"			500.00		1,467.78
May						
	1 Dividend	P. M. Co.			372.13	
	3 Tax service		75.00			1,764.91
	"		3,484.35			1,719.44
	8 Dividend	J. A. McC. & Co.			20,375.02	18,855.58
						[79]
May						
	15 Dividend	E. P. Co.			597.00	
	"	O. S. Co.			248.75	
	16 "	H. Ins. Co.			99.50	
	"	McC. B. Co.			181.49	

	29 Beneficiary				250.00	
	"				500.00	
	"				250.00	
	"				1,000.00	
June	31 Dividend	W. A. Co.		119.40		\$18,316.64
	1 Dividend	P. M. Co.		372.13		
	15 Dividend	A. & B.		298.50		
	17 Sale of Stock	Bk. Hawaii				
	Dividend	H. Ins. Co.	\$26,111.25			\$26,111.25
	"	McC. B. Co.		99.50		18,987.27
	"	O. S. Co.		181.49		
	25	C. B. & Co.		248.75		
	27	I-I-S. N. Co.		214.92		
	"	Bk. Hawaii		507.45		
				304.47		
	28 Beneficiary				250.00	
	"				500.00	
	"				250.00	
	"				1,000.00	
July	1 Dividend	P. M. Co.		744.26	26,111.25	18,543.85
	3 Sale of stock	E. P. Co.	47,000.00		26,111.25	19,288.11
	Doc. stamps		8.00		73,111.25	19,288.11
	15 Federal income tax		3,074.69		73,103.25	19,288.11
	Dividend	O. S. Co.			70,028.56	19,288.11
	16	H. Ins. Co.		497.50		
	"	McC. B. Co.		99.50		
	18	P. G. & E. Co. (c)		181.49		
	25	C. B. & Co.		24.76		
	29 Beneficiary			429.84		
	"				1,000.00	
	"				250.00	
	"				500.00	
	"				250.00	
August	1 Dividend	P. M. Co.		744.26	70,028.56	18,521.20
	15	O. S. Co.		497.50		
	16	H. Ins. Co.		99.50		
	20	McC. B. Co.		181.49		
	24	C. B. & Co.		214.92		
	27 Fee, petition to					
	Board		10.10			
	29 Beneficiary				70,018.46	20,258.87
	"					
	"					
	"					
	31 Dividend			238.80	70,018.46	18,258.87

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office.

(Seal)

W. H. TILLY,
Clerk, Circuit Court, First Circuit, Territory of
Hawaii.

[Endorsed]: 1st Circuit Court Territory of Hawaii. Filed 1936 Jan 22 PM 3:37. (S) Chas K. Buchanan, Clerk.

[Endorsed]: Petitioner's Exhibit No. 7. Admitted in evidence May 2, 1940.

Respondent's Exhibit A (continued)

Date	Character	Capital		Income		Balance	
		Expenditures	Receipts	Expenditures	Receipts	Capital	Income
1935							
September							
1 ..	P. M. Co.						\$ 744.26
..	O. S. Co.						497.50
..	A. & B.						497.50
1 ..	McC. B. Co.						181.49
..	H. Ins. Co.						99.50
							[80]
Dividend	J. A. McC. & Co.						12,859.38
..	Bk. of Hawaii						304.47
..	C. B. & Co.						429.84
..	I. L. S. N. Co.						507.45
Beneficiary				\$250.00			
..	"			500.00			
..	"			250.00			
..	"			1,000.00			
						70,018.46	32,619.05
October							
Dividend	P. M. Co.						744.26
1 ..	O. S. Co.						497.50
..	McC. B. Co.						181.49
..	H. Ins. Co.						99.50
1 ..	P. G. & E. Co. (c)	3,074.69					24.76
..							
..	Indo-Siam. income tax returns						
Dividend	C. B. & Co.			250.00			
Beneficiary				500.00			
..	"			250.00			
..	"			1,000.00			
						66,936.27	32,381.49
November							
Dividend	P. M. Co.						744.26
1 ..	O. S. Co.						497.50
..	H. Ins. Co.						99.50
1 ..	McC. B. Co.						181.49
2 ..	C. B. & Co.						429.84
..				1,000.00			
Beneficiary				250.00			
..	"			500.00			
..	"			250.00			
						66,936.27	32,334.08
December							
Dividend	W. A. Co.						298.50
Dividend	P. M. Co.						1,488.52
1 ..	O. S. Co.						3,482.50
1 ..	A. & B.						895.50
..	H. Ins. Co.						696.50
..	McC. B. Co.						181.49
1 ..	J. A. McC. & Co.						15,431.26
2 ..	B. Tr. Co.						31.09
2 ..	C. B. & Co.						859.68
2 ..	Bk. Haw.						304.47
..	I. L. S. N. Co.						845.75

[Title of Cause.]

DESIGNATION OF CONTENTS OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, the petitioner on review herein, by and through his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for the purpose of the review which he, the said petitioner on review, has heretofore taken to the United States Circuit Court of Appeals for the Ninth Circuit, hereby designates for inclusion in the record on review the following:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board:
 - (a) Petition, including annexed copy of deficiency notice,
 - (b) Answer to petition.
3. Opinion of Board promulgated November 27, 1940.
4. Decision of Board entered January 28, 1941.
5. Petition for review and statement of points.
6. Notices of filing petition for review. [83]
7. Statement of evidence and exhibits referred to therein (Petitioner's Exhibits 1 to 7, inclusive, and Respondent's Exhibit A).
8. This designation of contents of record.

Wherefore, it is requested that copies of the record as above designated be prepared and trans-

mitted to the United States Circuit Court of Appeals for the Ninth Circuit in accordance with the rules of said Court.

J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue.

Service of a copy of the within designation of contents of record on review is hereby admitted and agreed to this 29 day of April, 1941.

(S) URBAN E. WILD,

(S) MILTON CADES,

Attorneys for Respondent on
Review.

[Endorsed]: U. S. B. T. A. Filed May 13, 1941.

[84]

[Title of Board and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 84, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of

Tax Appeals, at Washington, in the District of Columbia, this 21st day of May, 1941.

(Seal)

B. D. GAMBLE,

Clerk,

United States Board of Tax
Appeals.

[Endorsed]: No. 9832. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Bishop Trust Company, Limited, Executor of the Estate of John A. McCandless, deceased, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed May 26, 1941.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit.

U. S. C. C. A. 9832.

B. T. A. Docket No. 97943.

GUY T. HELVERING, Commissioner of Internal
Revenue,

Petitioner on Review,

vs.

BISHOP TRUST COMPANY, LIMITED, EX-
ECUTOR OF THE ESTATE OF JOHN A.
McCANDLESS, DECEASED,

Respondent on Review.

Designation of Portion of the Record
To Be Printed.

Comes Now the petitioner on review herein, and complying with the rules of this Court, pertaining to the designation of the portion of the record to be printed, states that he relies upon the entire record certified by the Clerk of the Board of Tax Appeals to this Court, and directs that said record so certified be printed as the record on review.

Respectfully submitted,

J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue.

STATEMENT OF SERVICE:

A copy of this designation of portion of the record to be printed was mailed to Urban E. Wild, Esq., and Milton Cades, Esq., 400 Bishop Trust Bldg., Honolulu, T. H., attorneys for respondent on review, this date, May 24, 1941.

CHARLES E. LOWERY,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed May 28, 1941. Paul P. O'Brien,
Clerk.

No. 9832

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BISHOP TRUST COMPANY, LIMITED, EXECUTOR OF THE
ESTATE OF JOHN A. McCANDLESS, DECEASED, RE-
SPONDENT

ON PETITION TO REVIEW A DECISION OF THE UNITED STATES
BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

J. LOUIS MONARCH,
SHERLEY EWING,
Special Assistants to the Attorney General.

FILED

DEC - 2 1941

PAUL F. O'BRIEN,
CLERK

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/ 26 30-417

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

No. 9832

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BISHOP TRUST COMPANY, LIMITED, EXECUTOR OF THE
ESTATE OF JOHN A. McCANDLESS, DECEASED, RE-
SPONDENT

*ON PETITION TO REVIEW A DECISION OF THE UNITED STATES
BOARD OF TAX APPEALS*

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Board of Tax Appeals (R. 18-29)
may be found in 42 B. T. A. 1309.

JURISDICTION

This case involves the income tax of an estate for the fiscal year ended January 31, 1936. The decision of the Board of Tax Appeals was entered January 28, 1941 (R. 29-30), and the petition for review was filed April 19, 1941 (R. 30-37), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether the income of a decedent's estate accumulated during the period of administration and paid over upon final settlement of the estate to the testamentary trustee of the residue was deductible as income properly paid or credited to a legatee within the meaning of Section 162 (c) of the Revenue Act of 1934.

STATUTE INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary. (U. S. C., Title 26, Sec. 162.)

STATEMENT

The relevant facts may be summarized, principally from the opinion of the Board (R. 18-29), as follows:

The decedent, a resident of Honolulu, died on January 30, 1930. He disposed of a large estate by will, naming respondent, Bishop Trust Company, Ltd., as executor and also as the testamentary trustee of his residuary estate. The respondent qualified as executor and since the final settlement of the estate has acted as testamentary trustee. The will provided that the executor pay to the decedent's widow \$1,000 per month during administration of the estate and \$250 per month to each of four grandchildren. (R. 20.)

The provision in the will establishing the trust of the residuary estate was as follows (R. 21):

Eighth. I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal or mixed, wheresoever situated and of every kind or nature, and any property over which I shall possess any power of appointment, to Bishop Trust Company, Limited, an Hawaiian corporation, in trust for the uses and purposes and with the powers as hereinafter stated, * * *

The trustee was directed to "pay and deliver from the accumulations and net income of my said trust estate" \$1,000 per month to the widow until the youngest grandchild reached twenty-one after which the widow was to receive one-tenth of the annual net income of the trust. Similarly, the trustee was to "pay and deliver from the accumulations and net income" \$250 per month to each grandchild, who was to receive

one-tenth of the annual net income of the trust after reaching twenty-one years of age. The surplus income of the trust estate was to be accumulated and invested. The trust was to terminate when the youngest grandchild reached thirty years of age and one-fifth of the estate was to be paid to the widow, if living, and one-fifth to each grandchild *per stirpes*. (R. 21.) In January, 1936, the executor filed a petition with the probate court requesting approval of its first and final account of the administration and requesting that "an order be made to deliver over such property as remains to the persons thereto entitled." On January 21, 1936, the probate court entered an order that the Bishop Trust Company, Ltd., should convey "the assets remaining in its hands as Executor" to itself as trustee. Pursuant to this order the Bishop Trust Company, Ltd., transferred and delivered to itself "the residue of the decedent's estate" and it was discharged as executor subject to the performance of specific acts which have since been performed. (R. 22, 23.) The respondent did not inform the Commissioner of his discharge as executor in the manner provided in Section 312 of the Revenue Act of 1934. (R. 4.)

The respondent kept its accounts and made its income tax returns on the cash basis. The returns were filed with the Collector at Honolulu. (R. 23.)

Included in the residuary estate of the decedent which was transferred to the respondent as testamentary trustee was \$20,504.58 cash which had been received by the respondent, as executor, as income during the taxable year. The record does not indicate

that any of this income was distributed during the taxable year to the beneficiaries of the trust. In the return filed on behalf of the estate this amount was claimed as a deduction. In the determination of the deficiency herein involved the Commissioner disallowed this deduction on the ground that it was not allowable under the provisions of Section 162 (c). The Bishop Trust Company, Ltd., as testamentary trustee, in the return filed on behalf of the trust for the same fiscal year, included in the gross income of the trust \$19,639.72 of the amount and paid income tax thereon. (R. 24.)

There were other deductions and issues before the Board, but on this appeal the only question is the deductibility of the amount of \$20,504.58 from the income of the estate during the period of administration.

STATEMENT OF POINTS TO BE URGED

It is submitted that the Board of Tax Appeals erred in deciding and holding that the \$20,504.58 income received by the estate during the taxable year was deductible from the estate's gross income under Section 162 (c); and in deciding and holding that such amount was paid to the testamentary trustee as income and not as part of the corpus of the trust.

SUMMARY OF ARGUMENT

The amount of income is taxable to the decedent's estate unless some statutory provision to the contrary is clearly established. Under the terms of this will and the provisions of local law, this income became part of the gross estate passing to the residuary trustee and therefore was not taxable as income in the hands of the

trustee. Since it was not paid or credited to a legatee, heir, or beneficiary as income, it was not deductible from the gross income of the estate during the period of administration. The Board committed legal error in holding to the contrary.

ARGUMENT

Estate income passing to a residuary trustee as corpus is not income paid or credited to a legatee

Under Section 161 (a) (3) of the Revenue Act of 1934, the income received by estates of deceased persons during the period of administration is subject to the taxes imposed upon individuals. In the present case the respondent is seeking a deduction from the amount of taxable income and therefore it must be established that there is some clear statutory provision by which the Congress intended to grant the claimed deduction. *New Colonial Co. v. Helvering*, 292 U. S. 435; *Deputy v. DuPont*, 308 U. S. 488. The taxpayer contends, and the Board agreed, that the amount of income received by the estate during the period of administration was deductible as income properly paid or credited to a legatee within the meaning of Section 162 (c).

We submit that by the terms of the will the income accumulated during the period of administration of the estate became part of the corpus of the estate and that the testamentary trustee took it over as such in January, 1936. The will provided that certain payments be made during the period of administration. (R. 20.) After certain specific bequests (R. 58-59), the "rest, residue and remainder * * *, real, personal or

mixed, wheresoever situated and of every kind or nature * * *'' was devised and bequeathed to the testamentary trustee. (R. 21.) The petition of the executor to the probate court requested an order to "deliver over such property as remains * * *." Pursuant to this request the probate court ordered the executor to transfer the *assets* remaining in its hands. (R. 22.) The petition before the Board stated that the amount herein involved was "included in the residuary estate of the taxpayer" (R. 8) and the Board stated that the \$20,504.58 cash was "included in the residuary estate of the decedent" (R. 24). The trustee was to control, manage and hold the trust and collect the income. (R. 60.) It could reinvest the unapplied income. (R. 61.) The payments were to be made from the "accumulations and net income" of the trust. (R. 21.) It is clear from the provisions that there was a difference between the payments to be made to the widow and grandchildren during the administration period and those to be made under the trust. During the period of administration the payments were to be made without regard to the presence or absence of income. The beneficiaries were to receive certain amounts and there was no requirement that such amounts be paid from the income of the estate, nor did they have any claim to the income as such. Since the will made no disposition of the income from the estate it became part of the corpus of the estate. That is, it became an indivisible part of the whole sum which was to pass as such to the residuary trustee. It thereby became the trust corpus from which income was to be derived to make certain payments to the beneficiaries of the trust.

Our contention is supported by the fact that the payments from the trust were to be made from the accumulations and net income of the *trust*. In other words, the payments during administration were to be made from any source (R. 57), while those from the trust were to be made only out of income earned or accumulated during the existence of the trust (R. 63, 64). The beneficiaries of the trust had no claim to the amount herein involved as income even after it reached the trust. Their claim was to be paid from the net income of the trust. Having differentiated between the two payments, the decedent clearly intended that the income received during the period of administration become part of the gross estate passing under the residuary clause, and not income which any legatee was entitled to demand. It is the intention of the testator that governs. *Hawaiian Trust Co. v. Von Holt*, 216 U. S. 367. Moreover, it is a fact that the parties so considered the accumulated income and it has not been paid to the beneficiaries as income. It was turned over as a part of the residuary estate out of which income might be payable, but not as income to which the beneficiaries of the trust were entitled.

Although the income became corpus of the estate, the trustee nevertheless received it. This but emphasizes the fact that the right of the trustee to receive it did not at all depend upon whether or not the estate possessed income. Recipients like the trustee, who are entitled to payments from an estate in any event, acquire by bequest, devise or inheritance and are not charged with the receipt of income. *Burnet v. Whitehouse*, 283 U. S. ★

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283 U. S. ...

Inserts opposite page 9 Government's Brief in
#9832, Comm'r of IR vs Bishop Trust

- * Additional authorities supporting text in
last paragraph of page 8:

Anderson's Estate vs. Comm'r,
126 F. (2d) 46, (CCA 9)

Comm'r vs. Sheldon (CCA 6)
decided February 16, 1943.

Wilcox vs Comm'r, 43 B.T.A. 931
on appeal to this Court in
respect of other questions
(CCA 9 #10003)

Durkheimer vs Comm'r,
41 B.T.A. 585.

- ** Additional authorities supporting text
of first sentence in last paragraph
on page 9:

Roebling v. Comm'r
96 F. (2d) 387 (CCA 3)

Comm'r vs Sheldon,
(CCA 6) decided Feb. 16, 1943

Comm'r vs. Clark
(CCA 2) decided January 14, 1943.

area opposite page 9 Government's brief in
1932, Comm'r of IA vs Blanche Frost

Additional authorities supporting text in
last paragraph of page 8:

Anderson's Estate vs. Comm'r,
126 F. (2d) 46, (CCA 9)

Comm'r vs. Sheldon (CCA 6)
decided February 10, 1943.

Wick vs. Comm'r, 43 B.T.A. 931
on appeal to this Court in
respect of other questions
(CCA 9, 110003)

Frankfurter vs. Comm'r,
41 B.T.A. 582.

Additional authorities supporting text
of first sentence in last paragraph
on page 9:

Knobling v. Comm'r
90 F. (2d) 387 (CCA 9)

Comm'r vs. Sheldon,
(CCA 6) decided Feb. 10, 1943

Comm'r vs. Clark
(CCA 2) decided January 14, 1943.

v. Whitehouse,

148; *Weigel v. Commissioner*, 96 F. (2d) 387 (C. C. A. 7th). Cf. *Irwin v. Gavit*, 268 U. S. 161. The *Whitehouse* case, *supra*, held that where the terms of the will directed that an annuity be paid without reference to the existence or absence of income, then the annuity was not taxable as income to the beneficiary; it was property received by bequest and therefore not taxable to the annuitant.

Congress has allowed deductions only for income currently distributed and this Court has held that a payment to a recipient who was entitled to the money only because it was accumulated income is not a distribution of current income. *Spreckels v. Commissioner*, 101 F. (2d) 721. In the *Spreckels* case this Court held that the accumulated income of an estate which was not to be currently distributed was taxable to the estate and not to the beneficiary, even though the latter received it in the same taxable year during which it was accumulated. Cf. *Lynchburg Trust & S. Bank v. Commissioner*, 68 F. (2d) 356 (C. C. A. 4th).

Since the amount of \$20,504.58 in this case was not paid or credited to a legatee as income, nor received as income, it was not deductible under Section 162 (c). *Weigel v. Commissioner*, *supra*. See also G. C. M. 22034, 1940-1 Cum. Bull. 90. Such sums must be actually distributed as income, and not as assets, to the beneficiary before the beneficiary is taxable. *County Nat. Bank & Tr. Co. v. Helvering*, 122 F. (2d) 29 (App. D. C.). Moreover, the Board itself recently held that if the sole beneficiary of a testamentary trust did not actually receive the income, then the profits of a part-

Helvering v. Helvering - 41 B.T. 585

nership of which the trust was a member were taxable to the estate. *Buckner v. Commissioner*, 45 B. T. A. No. 90.

The cases involving the law of Hawaii in this regard support our contention. In *Hawaiian Trust Co. v. Von Holt*, *supra*, there was involved a will with substantially the same effect as in the instant case. It was held that the beneficiary of the trust was not entitled to the income from the death of the testator, but only after the executor had been discharged and the property turned over to the trustee. In deciding the case of *Wilcox v. Wilcox*, 26 Haw. 219, the Supreme Court of the Territory of Hawaii expressly stated that the case was different from the *Von Holt* case. In the *Wilcox* case there was a dispute between life tenants and remaindermen concerning the income during the period of administration. The court decided in favor of the life tenants, holding that the provisions of the particular will clearly indicated an intention on the part of the testator that the trust fund corpus consist only of property of which he died possessed.

It is apparent that the Board erred in not giving proper effect to the provisions of the will and local law involved. The Board also erred in its interpretation of *White v. Commissioner*, 41 B. T. A. 525, and the *Weigel* case, *supra*. The decisive factor in the *Weigel* case was not that the particular income was a gain from the sale of capital assets. That was significant only because it demonstrated that it was not to be currently distributed. The rationale of the decision was that the

profit or income of the estate became part of the corpus of the trust by virtue of the will provisions. The fact that the profits come from capital gains is immaterial. *Chambers v. Commissioner*, 33 B. T. A. 1125. It is also immaterial whether the estate income becomes part of the trust corpus by virtue of the will provisions or by the force of local law. *Weigel v. Commissioner, supra*. It is apparent that in the *White* case the income was carefully segregated from the rest of the funds. Moreover, part of it was actually paid to the beneficiary. The Commissioner did not acquiesce in that decision. 1940-1 Cum. Bull. 9.

The Board, having found that the cash here was an asset and part of the residuary estate (R. 21-24), erred in not determining that it was not income paid or credited to a legatee.

CONCLUSION

Since the decision of the Board of Tax Appeals that there was a reduced deficiency is not supported by the evidence and is based on legal error, it should be reversed and the deficiency as asserted by the Commissioner should be reinstated.

Respectfully submitted.

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NOVEMBER 1941.

No. 9832

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

VS.

BISHOP TRUST COMPANY, LIMITED, Executor
of the Estate of John A. McCandless,
Deceased,

Respondent.

On Petition to Review a Decision of the United States
Board of Tax Appeals.

BRIEF FOR RESPONDENT.

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CLERK

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General Council Memorandum

No. 9832

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

VS.

BISHOP TRUST COMPANY, LIMITED, Executor
of the Estate of John A. McCandless,
Deceased,

Respondent.

On Petition to Review a Decision of the United States
Board of Tax Appeals.

BRIEF FOR RESPONDENT.

OPINION BELOW.

The opinion of the Board of Tax Appeals (R. 18-30) was filed on November 27, 1940, and is reported in 42 B. T. A. 1309.

JURISDICTION.

The decision of the Board of Tax Appeals (R. 29-30) was entered on January 28, 1941, and the petition for review (R. 30-37) was filed on April 19, 1941. The jurisdiction of this Court is invoked under Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED.

Whether the income of a decedent's estate received by the estate during the period of administration or settlement of the estate and within the taxable year and paid over to the testamentary trustee as a part of the residue of the decedent's estate was deductible as income properly paid or credited to a legatee, heir or beneficiary within the meaning of Section 162(c) of the Revenue Act of 1934?

STATUTE INVOLVED.

Revenue Act of 1934, c. 277, 48 Stat. 680:

"Sec. 162. Net Income.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * * *

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary. (U. S. C., Title 26, Sec. 162.)"

STATEMENT OF FACTS.

Respondent on review, Bishop Trust Company, Limited, a Hawaiian corporation, was during the taxable year 1936 the duly appointed and acting executor under the will and of the estate of John A. McCandless, who died a resident of Honolulu on January 30, 1930. He left a large estate and in his will named Bishop Trust Company, Limited, as his executor and also as the testamentary trustee of his residuary estate and it duly qualified as such. The will provided that the executor pay to the decedent's widow \$1000 per month for support and maintenance during the administration of his estate, the first of such payments to be made one month from the date of his death and succeeding payments in like amount on the same day of each succeeding month until such time as his residuary estate should be turned over to the testamentary trustee. He also directed that the executor should pay to each of his four grandchildren for support, maintenance and education during the administration of the estate \$250 per month, the first payment to be made one month from the date of his death and succeeding payments on the same day of each succeeding month until such time as his residuary estate should be turned over to the testamentary trustee (R. 20).

The provision in the will establishing the trust of the residuary estate was as follows:

“Eighth. I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal or mixed, wheresoever situated and of every kind or nature, and any property over

which I shall possess any power of appointment, to Bishop Trust Company, Limited, an Hawaiian corporation, in trust for the uses and purposes and with the powers as hereinafter stated, * * *"
(R. 21)

The trustee was directed "to pay and deliver from the accumulations and net income of my said trust estate" \$1000 per month to the widow beginning one month from the date of the last monthly payment made to the widow by the executor and continuing until such time as his eldest grandchild should attain the age of twenty-one years, after which the widow was to receive one-tenth of the annual net income of the trust. The trustee was also directed "to pay and deliver from the accumulations and net income of my said trust estate" \$250 per month to each grandchild. After a grandchild attained the age of twenty-one years he or she was to receive one-tenth of the annual net income of the trust estate. Surplus income of the trust estate was to be accumulated and invested. When the youngest grandchild attained the age of thirty years the trust was to determine and one-fifth of the trust estate was to be paid to the widow, if living, and one-fifth to each grandchild per stirpes (R. 21).

On January 12, 1936, the respondent on review filed a petition in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, sitting in probate, requesting approval of its first and final account of the administration of the estate, and that "an order be made to deliver all such property as remains to the persons entitled thereto, and that petitioner be re-

lieved from all further responsibilities as executor under the will and of the estate of John A. McCandless" (R. 22).

On January 21, 1936, the Probate Court entered an order that Bishop Trust Company, Limited, should convey, transfer and deliver the "assets remaining in its hands as executor" to itself as trustee (R. 22). Pursuant to said order, Bishop Trust Company, Limited, as executor, transferred and delivered to itself as trustee the residue of the decedent's estate and was discharged as executor of the estate, subject to the performance of specific acts which have since been performed (R. 23).

The respondent on review kept its accounts and made its income tax returns on both Form 1040 and Form 1041 on a cash receipts and disbursements basis and on the basis of a fiscal year beginning February 1st and ending January 31st. The returns were filed with the Collector at Honolulu (R. 23).

Included in the residuary estate of the decedent, which respondent on review, as executor, transferred to itself as trustee, pursuant to the order of the Court, was \$20,504.58 cash, which had been received by the respondent on review, as executor, as income during the taxable year ended January 31, 1936. This amount was claimed as a deduction in the return which the respondent on review, as executor, filed on behalf of the estate for the fiscal year ended January 31, 1936. Bishop Trust Company, Limited, as testamentary trustee, in the return, filed on behalf of the trust for

the same fiscal year, included in the gross income of the trust \$19,639.72 of the said amount and duly paid income tax thereon (R. 24).

In the determination of the deficiency herein involved, the Commissioner disallowed this deduction on the ground that it was not allowable under the provisions of Section 162(c) of the Revenue Act of 1934 (R. 24).

The question of the deductibility of the amount of \$20,504.58 from the income of the estate is the only issue in this case before the Court.

SUMMARY OF ARGUMENT.

Section 162(c) of the Revenue Act of 1934 requires the following conditions to be present in order that an estate be allowed a deduction thereunder:

1. There must be involved income received by the estate of a decedent during the period of administration or settlement of the estate;
2. Such income must be properly paid or credited during such year; and
3. Such income must be paid or credited to a legatee, heir or beneficiary.

The Commissioner does not deny that all of the statutory conditions were fully met in the present case, but he seeks to add to the statutory requirements a new element, namely, that the income of the estate properly paid or credited to a legatee, heir or beneficiary during the taxable year is still not deductible

unless it was paid out as income, and then he erroneously contends that the amount paid out was not paid as income. The Board found against the Commissioner on both these contentions, and it is this finding that presents a very narrow issue in this case. Furthermore, this is a case where the trustee has already paid the tax on the amount here in question and the Commissioner, by raising a new and as we contend unfounded technical issue, seeks to assess the tax for a second time on the same amount against the executor.

Respondent on review contends:

1. That it is not necessary that the payment of the income of an estate in administration be made to a legatee, heir or beneficiary as income in order that such income paid may be deducted by the estate in computing its net income.

2. That even if it were necessary that income of an estate in administration be paid to a legatee, heir or beneficiary as income in order to be deductible by the estate in computing its net income, the income here in question was so paid out to the beneficiary as income.

(A) Under the laws of the Territory of Hawaii the income in question retained its character as income upon distribution by the executor of the estate.

(B) Under the provisions of the will the income of the estate retained its character as income when distributed to the testamentary trustee.

ARGUMENT.

1. THAT IT IS NOT NECESSARY THAT THE PAYMENT OF THE INCOME OF AN ESTATE IN ADMINISTRATION BE MADE TO A LEGATEE, HEIR OR BENEFICIARY AS INCOME IN ORDER THAT SUCH INCOME PAID MAY BE DEDUCTED BY THE ESTATE IN COMPUTING ITS NET INCOME.

The Commissioner of Internal Revenue has admitted in his answer to the petition of the respondent on review (Par. V(M)), (R. 17), that "included in the residuary estate of the taxpayer which was conveyed, transferred and delivered, on January 22, 1936, to Bishop Trust Company, Limited, trustee, under the will and of the estate of John A. McCandless, deceased, pursuant to an order of Court made January 21, 1936, was \$20,504.58 cash income received by the taxpayer during the taxable year ended January 31, 1936, as alleged in subparagraph M of paragraph V of the petition".

The Commissioner does not dispute that this amount which was admittedly income of the estate during administration was properly paid or credited during such year. The Commissioner appears to recognize the well settled rule of law that the law of the state having jurisdiction of the estate and the trust is determinative of whether the distribution is proper or not.

In *G.C.M.* 4596, VII-2, *C.B.* 133, the question was whether where the will merely provided for the distribution of bequests and for the disposition of the residuary estate, and was silent as to the distribution of income during administration, the amount paid or credited to the residuary legatee in respect to current

income may be recognized under Section 219(b)(3) of the Revenue Act of 1926. (This section is identical with Section 162(c) of the Revenue Act of 1934.) The answer given in said *G.C.M.* was that the law of the particular state involved must be considered in determining whether the income may be properly paid or credited to the residuary legatee and any income properly paid or credited is deductible, and unless the will or the applicable state law makes the payment or credit improper, it is deductible under said section. *I.T.* 2349, VI-1, *C.B.* 78, and *Tyler*, 9 B.T.A. 255, are cited in support thereof.

In *Proctor v. White*, 28 Fed. Supp. 161 (D.C. Mass.), it was said that the words "properly paid" in the Revenue Acts means rightly paid with legal justification, and since the testatrix was a resident of Massachusetts and the disposal of her property in the estate was subject to the orders of its Courts respecting distributions of estates, the laws of that state, with jurisdiction of the administration, determine what income of the trust is properly to be paid to the beneficiariēs.

In *County National Bank and Trust Company, Executor*, 39 B.T.A. 357, it was said that the provisions of the will and the laws of the state having jurisdiction over the administration determine what income of a trust estate was properly paid to the beneficiary, and there was cited in support thereof *Anderson v. Wilson*, 289 U.S. 20, and *Merchants Loan and Trust Company v. Smietanka*, 255 U.S. 509.

In *Sewell v. U.S.*, 19 Fed. Supp. 657 (Ct. Cl.), it was said that there can be no question but that the law of the state, as promulgated by the Courts of the state in which the will is probated, governs in the interpretation of the trust as respects the taxability of the income as between the trust and the beneficiary.

The Commissioner apparently also concedes that Bishop Trust Company, Limited, trustee as aforesaid, was a legatee, heir or beneficiary within the meaning of Section 162(c). Under the provisions of the will of John A. McCandless, deceased, all the rest, residue and remainder of the estate, real, personal or mixed, was given to Bishop Trust Company, Limited, in trust for the uses and purposes therein stated. It is well settled that a trust created under a will may be a legatee, heir or beneficiary within the provisions of Section 162(c) of the Revenue Act of 1934. *Estate of Ida A. White, Deceased*, 41 B.T.A. 525. (Commissioner's Appeal dismissed October 16, 1940, C.C.A. 6.)

In *I.T.* 1621, II-1, *C.B.* 129, with regard to Section 219(c) of the Revenue Act of 1921, which is identical with Section 162(c) of the Revenue Act of 1934, so far as the determination of the net income of estates in administration is concerned, it was said:

“Amounts of income paid in final distribution if they are so paid in accordance with the law of the State and the terms of the will, if there is one, are properly paid or credited within the meaning of Section 219(c) and are, therefore, deductible in the return for the estate.”

The Commissioner, however, in spite of all the rulings and decisions and in spite of the very plain wording of the Revenue Act in question, would add a further element to the requirements of Section 162(c), namely, that in addition to income of the estate being properly paid or credited in the taxable year to a legatee, heir or beneficiary, it must retain its character as such upon the distribution. All the statute requires is that the amount in question be income of the estate during the taxable year, and the Commissioner has admitted that that is the case in the present instance. It is, therefore, respectfully submitted that it is not necessary to go any further into the question, but the issue can be determined upon the finding that inasmuch as the Commissioner has admitted that the amount in question distributed to the residuary trustee was income of the estate during the taxable year, distributed to a beneficiary during the taxable year in accordance with proper legal authority, that that is all the statute requires in order for the estate to be allowed the deduction claimed.

2. THAT EVEN IF IT WERE NECESSARY THAT INCOME OF AN ESTATE IN ADMINISTRATION BE PAID TO A LEGATEE, HEIR OR BENEFICIARY AS INCOME IN ORDER TO BE DEDUCTIBLE BY THE ESTATE IN COMPUTING ITS NET INCOME, THE INCOME HERE IN QUESTION WAS SO PAID OUT TO THE BENEFICIARY AS INCOME.

(A) Under the laws of the Territory of Hawaii the income in question retained its character as income upon distribution by the executor of the estate.

The law of the Territory of Hawaii with respect to the issue now before this Court is to the effect that when a testator gives the residue of his estate to trustees who are charged with the duty of paying the income thereof to certain named persons, they are entitled to the income of the clear residue as afterwards ascertained from the date of the death of the testator, and the fact that the executors are entitled to and do retain the residuary estate in their hands until the close of administration can make no difference in the status of income accruing thereon pending administration. If, therefore, the payment or delivery of the residuary estate to the trustees by the executors is postponed until the close of administration and the executors have in the meantime collected the income earned by the securities in which the residuary estate is invested and delivered it, together with the securities, to the trustees, the trustees must in the absence of provisions in the will indicating that the testator had a different intention treat such sum so delivered to them as income and distribute it in accordance with the terms of the will. *Wilcox v. Wilcox*, 26 Haw. 219, at page 229.

The latest expression of the Supreme Court of the Territory of Hawaii, the Court of last resort in the

Territory, is the recent case of *Hawaiian Trust Company, Limited, Trustee, v. Cohen*, 35 Haw. 795. In that case there was involved a will in which all of the residue was left in trust to pay the net income to the decedent's widow. A large part of the assets of the estate were mortgaged or pledged and numerous claims were filed against the estate. The proceeds of the personal property were insufficient to pay the debts and the executor took possession of the mortgaged real property, collected the rents and paid taxes, interest and other charges thereon. In June of 1938 the executor had accumulated sufficient income to meet the amount of the mortgage obligations that the mortgagees were willing to accept. He petitioned the Court for permission to distribute and convey the real estate subject to the mortgage. The widow claimed that she was entitled to all the net income accruing after the date of the testator's death and, therefore, that she was to be reimbursed for all the income disposed of by the executor and also that applied in reduction of the principal of the mortgage. She contended that under the rule of *Wilcox v. Wilcox, supra*, she was entitled to the income of the estate from the date of death of the testator. The Court said it is well established in this jurisdiction that when the testator gives the residue to the trustee to pay the income thereof to a named person for life and no time is mentioned in the will for the commencement thereof, the beneficiary is entitled to the clear residue as afterwards determined, to be computed from the time of the date of death. The Court further stated that, although there are some decisions to the contrary its holding

is supported by the great weight of authority, and the reason is that the life tenant is first in the consideration of the testator.

Section 1, *Revised Laws of Hawaii 1935*, reads in part as follows:

“*Sec. 1. Common law applies except when.* The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; * * *.”

An examination of the authorities makes it clear that the rule set forth in the cases of *Hawaiian Trust Company, Limited, v. Cohen, supra*, and *Wilcox v. Wilcox, supra*, is in accordance with “the common law of England as ascertained by English and American decisions”, which is declared to be the common law of the Territory of Hawaii.

In *Pollock v. Learned*, 102 Mass. 49, it was said that it has long been held in England that in cases of bequests of life estates in a residuary fund, when no time is specified for the commencement of the interest or the enjoyment or use of the income, the legatee for life is entitled to the income of the clear residue as afterwards ascertained, to be computed from the time of death, and that the same rule was made a part of the positive law of the State of Massachusetts as early as 1848 and is also the law of New York.

In *Ayer v. Ayer*, 128 Mass. 575, it was said that the general rule of law is well established that a tenant for life is entitled to the income of a fund set apart for his benefit from the date of death, and that the general rule of law is in harmony with the Massachusetts statute to the effect that when by a will an annuity income or interest of property or a fund in trust is given, the beneficiary is entitled to receive the same from and after the date of death of the testator.

In *Sargent v. Sargent*, 103 Mass. 297, the Court again said that the general rule is established that the life tenant is entitled to the income of the residuary given in trust from the time of the testator's death, and that any other rule would take the income from the life tenant and apply it to increase the capital for the benefit of the remaindermen. To the same effect is *Edwards v. Edwards*, 183 Mass. 581, 67 N. E. 658.

In *Lawrence v. Littlefield*, 215 N. Y. 561, 109 N. E. 611, the Court had for consideration a Massachusetts statute to the effect that when an annuity or income of property, real or personal, is given by will in trust for the benefit of a person for life, such person shall be entitled to receive and enjoy the same from and after the decease of the testator unless otherwise provided in the will or testament. The Court said that an examination of the *Edwards*, *Sargent* and *Ayer* decisions, *supra*, discloses that the rule there set forth is not based on any statute but was the rule of law with which it was said that the statute above referred to was in harmony. The Court cited *Williamson v.*

Williamson, 6 Paige, Ch. 298, 304, which involved the question of the date from which interest was to be paid to the widow on a bequest to her of the use of the residuary estate during her life, and where it was concluded that the life tenant of the residuary estate, where no time for the commencement of interest or enjoyment of the use or income is fixed, is entitled to the interest or income of the clear residue as afterwards ascertained from the date of death. The Court quoted from that case as follows:

“All the cases which appear to conflict with this rule * * * will be found to be cases in which the testator had directed one species of property to be converted into another, or the residuary fund to be invested in a particular manner, and had then given a life estate in the fund as thus converted and invested. In such cases it appears to be consistent with the will of the testator to consider the life estate as commencing when the conversion takes place, * * * either within the year or at the expiration of that time. But, as a year is considered a reasonable time for the executor to comply with the testator’s directions as to conversion * * * the legatee cannot be kept out of the interest or income beyond that period.”

In *In re Stanfield’s Estate*, 135 N. Y. 292, 31 N. E. 1013, it was said that where the income of an estate or a designated portion is given to a legatee for life, he immediately becomes entitled to it whenever it accrues, and if it produces income from the death of the testator he can require the executor to account to him for the income from that time. The rule that the

general legacy shall not bear interest until the expiration of one year from the grant of letters has no application in such case. It is by its terms limited to general legacies payable out of corpus of the estate. Here the gift is of nothing possessed by the testator in his lifetime but of that which is to arise or accrue afterwards. The weight of authority undoubtedly now is in favor of allowing the payment of annuities or income to commence at the testator's death, and the authority seems abundant that when a sum is left in trust with a direction that interest and income are to be applied to the use of a person he is entitled to the interest from the date of death.

The Commissioner states that the cases involving the law of Hawaii support his contention to the effect that the accumulated income of the estate was turned over to the residuary trustee and not as income to which the beneficiaries of the trust were entitled, and cites in support of that contention (Br. 10) *Hawaiian Trust Company v. Von Holt*, 216 U. S. 367, which he contends involved a will with substantially the same effect as in the instant case. In that case the Court had before it a bill in equity by the trustees for instructions. The executors had turned over to the trustees all the property held by them on their discharge. The question involved was whether the widow was entitled to any part of the income of the estate derived from real property before it was turned over to the trustees. The executors under the will were ordered to reduce all the estate, real and personal, to possession and to collect the income pend-

ing distribution, to have its value adjudged, to pay the debts and funeral expenses. The widow was given one-third of the value of the personal property as adjudged after the payment of debts, which was to be paid to her in cash. If the position of the estate did not warrant the payment in full, it was to be paid to her as soon as the interest and income of the estate permitted, without selling the real estate or sacrificing the personal property to raise the sum, providing that the payment must be made in two years and that no interest was to be paid during that two year period. The widow was also to have the use and occupancy of decedent's dwelling house, furniture, etc., and such allowance as the Court might fix. As soon as the debts were paid and the widow's right to one-third of the personal estate was satisfied, the executors were to conclude the administration and distribute the residue to the trustees. The trustees were to reduce all property to possession and manage it and segregate the accounts of the real and personal property, and out of the income of the real estate to pay one-third thereof to the widow during her life. The provisions of the will were stated to be in lieu of dower and the widow was one of the executors and trustees. It took five years to administer the estate, although it was ready for distribution more than three years prior to the actual closing of administration. The Court held that since the trustees were required to segregate the accounts of the real estate after it was distributed to them, the will actually meant that one-third of the income of the real estate was not given to

the widow but only one-third of the income of the real estate after it came into the hands of the trustees, and, therefore, under the provisions of the will it was not until the real estate was actually in the hands of the trustees that they began to pay income to her. The Court distinguished the provisions of the will from that in *Lovering v. Minot*, 9 Cush. (Mass.) 151, where one-third of the income of the real estate generally was given to the beneficiaries. The Court there held that the beneficiaries were entitled to income from the death and that when the funds were transferred from the executor to the trustee the accounts of the executor must show what was received from income and what from capital and it was the duty of the trustee to distribute the part which was composed of income and retain the capital.

The *Von Holt* case, *supra*, clearly falls within the class of cases discussed in *Lawrence v. Littlefield*, *supra*, where the Court said that all the cases which appear to conflict with the rule that the life tenant of the residuary estate is entitled to the use or income from the date of death, will be found to be cases where the testator directed one species of property to be converted into another, or a residuary fund to be invested in a particular matter, and then the life estate to be in the fund so converted and invested.

In the case of *Wilcox v. Wilcox*, *supra*, the Supreme Court of the Territory of Hawaii expressly stated that the facts in the *Von Holt* case (designated *Campbell Estate v. Campbell-Parker*, 18 Haw. 34, in the Supreme Court of the Territory of Hawaii) was

not inconsistent in any respect with the holding in the *Wilcox* case, and then pointed out that the provisions in the will of James Campbell differ in material respects from the provisions of the will in the *Wilcox* case. In the Campbell will the Supreme Court pointed out (p. 230) the testator directed that after the payment of his debts, etc., and the aforesaid provision for his wife (payment to her of such amount as the probate judge shall approve for the maintenance of herself and children), his executors should obtain a decree of distribution of his estate. He then devised and bequeathed to the trustees named in the will all the rest, residue and remainder of his estate not otherwise given in trust, and provided that "and the trustees herein provided for, from and after their entry upon their functions of trust hereunder shall make such further provision for the maintenance of said children as is hereinafter directed". The will then continues:

"With respect to all property which shall be so distributed to them, I direct my trustees aforesaid to reduce it to possession and to collect all the rents, issues, profits, income and revenue thereof, to invest all moneys that shall come to their hands by virtue hereof and which are not otherwise herein specifically bequeathed, assigned or appropriated."

The Court held that in that case the will provided that it was only after the administration was closed and the estate distributed to the trustees that either the widow or any of the children were to begin to share

in the income of the real estate. The will clearly provided for the creation of a trust out of the residue of the estate and for the payment of the income of the trust, which the testator directed to be made by the trustees, from and after their entry upon their functions of trust. That is an all together different arrangement from that in the present case, where payments were to be made by the executor from the date of death and the trustee was to continue those payments without interruption, and where the scheme of the testator necessarily involved the carrying over of the income of the estate as income in the hands of the trustee. It is apparent from a reading of the *Wilcox* case that the rule stated there governs in the present case, and when the more recent case of *Hawaiian Trust Company, Limited v. Cohen* is considered, there is no doubt but that the law of Hawaii is that in cases such as the present one the income of the estate retains its character as such upon distribution to the residuary trustee.

(B) Under the provisions of the will the income of the estate retained its character as income when distributed to the testamentary trustee.

The petitioner on review argues (Br. p. 6) that under the terms of the will the income accumulated during the period of administration of the estate became part of the corpus of the estate and that the testamentary trustee took it over as such in January, 1936. The petitioner on review states the facts supporting his argument as follows:

The will provided that certain payments be made during the period of administration and after certain specific bequests the rest, residue and remainder was devised and bequeathed to the testamentary trustee; the petition of the executor to the Probate Court requested an order to deliver over such property as remains, and pursuant to this request the Probate Court ordered the executor to transfer the assets remaining in its hands; the petition before the Board stated that the amount herein involved was included in the residuary estate of the taxpayer and the Board stated that the \$20,504.58 cash was included in the residuary estate of the decedent; the trustee was to control, manage and hold the trust estate and collect the income therefrom and he could reinvest unapplied income; the payments were to be made from the accumulations and net income of the trust; there was a difference between the payments to the widow and the children during the period of administration and those to be made under the trust, in that during the administration period payments were to be made without regard to the presence or absence of income; the beneficiaries were to receive certain amounts and there was no requirement that such amounts be paid from the income of the estate, nor did they have claim to the income as such; since the will made no disposition of the income of the estate it became part of the corpus, that is, an indivisible part of the whole sum which was to pass as such to the residuary trustee, thereby becoming the trust corpus from which income was to be derived to make certain payments to

the beneficiaries of the trust; the payments from the trust were to be made from the accumulations and net income of the trust and payments during administration were to be made from any source, while those from the trust were to be made only out of income made or accumulated during the existence of the trust; the beneficiaries of the trust had no claim to the amount herein involved as income even after it reached the trust, since their claim was to be paid as income from the net income of the trust; the decedent intended the income received during the period of administration to pass under the residuary clause and not as income which the legatee could demand; the parties so considered the accumulated income and it has not been paid to the beneficiaries as income but was turned over as part of the residuary estate, out of which the income might be payable but not as income to which the beneficiaries of the trust were entitled.

The statements of the facts on which the petitioner on review bases his argument contain a number of misstatements of fact as well as misconceptions of law. Actually the petition before the Board stated that:

“Included in the residuary estate of the taxpayer which was conveyed, transferred and delivered on January 22, 1936, to Bishop Trust Company, Limited, Trustee and sole residuary legatee under the will and of the estate of John A. McCandless, Deceased, pursuant to an order of court made January 21, 1936, was \$20,504.58 of the \$31,248.09 cash income received by the tax-

payer during the taxable year ended January 31, 1936." (Pet. V(M), R. 8.)"

The Commissioner's answer was as follows:

"* * * V * * * (M) Admits that included in the residuary estate of the taxpayer that was conveyed, transferred and delivered on January 22, 1936, to Bishop Trust Company, Limited, Trustee under the will and of the estate of John A. McCandless, Deceased, pursuant to an order of court made January 21, 1936, was \$20,504.58 cash income received by taxpayer during the taxable year ended January 31, 1936, as alleged in subparagraph (M) of paragraph V of the Petition, but denies the remaining allegations contained in said paragraph."

Although the petition of the executor to the Probate Court requested an order to deliver over such property as remains, the petition also asked for the approval of its accounts as shown on schedules attached to the petition, which schedules showed that all the cash on hand at the time was accumulated income for the period, and the Court specifically approved the said schedules. The respondent on review did not offer the said schedules or the petition in evidence because the Commissioner in his answer to the petition admitted that the \$20,504.58 turned over to the residuary trustee was income of the estate for the taxable year.

Another fact which bears on the problem is that the executor was also given authority to keep the administration of the estate open for such length of time

as may seem necessary to it to best protect the interests of the estate, and the executor was authorized to pay legacy, inheritance, transfer or other duties or taxes on the estate or any interest in the estate from income and/or capital as seems to the executor to the best interest of the estate. It was also given power to sell or lease real estate if it was deemed advisable before the personal property of the estate was sold. It was also given authority to borrow money on the security of the assets of the estate in order to secure funds to pay taxes or charges or to finance the estate, or for any other reason that seems necessary or advisable to the executor. If money was borrowed the executor was authorized to repay it from income and/or capital and it was directed that the specific bequests be paid as soon as possible without embarrassment to the estate but without drawing interest. While it is true that the payments by the trustee were to be made from the accumulation and net income of the trust, the first payment was to be made one month after the last monthly payment by the executor, and the trustee was given discretion to pay larger amounts out of the income to meet an emergency of any kind affecting the welfare of the widow or of all or any of the decedent's grandchildren and for their further education, which payment was to be treated as an expense of the estate and was not to be a charge on the interest of the beneficiary.

The statements that the beneficiaries did not have any claim to the income of the estate as such and that since the will made no disposition of the income of the

estate it became part of the corpus of the estate and that the payments from the trust were limited to the accumulations and net income of the trust estate itself are all contrary to the law of Hawaii as hereinbefore discussed.

The decedent clearly intended the income received during the period of administration to pass as income to the legatees. This is evidenced by the fact that the decedent, who is presumed to know the law of the Territory, expressly provided that no interest should be paid on specific bequests, but he made no such denial with regard to the persons taking the income of the residue. In view of the provisions of the will permitting the executor to extend the period of administration as long as it deemed necessary, a denial of the right to income in the hands of the beneficiaries of the trust would be necessary in order to cut them out of their right to receive the same, and this the decedent was presumed to know.

The statement that the parties considered the accumulated income as a part of the residuary estate and that it has not been paid out to the beneficiaries as income is not supported by any evidence. There is no evidence that it was not considered income and no evidence that it was not paid to the beneficiaries as income. The schedules attached to the petitions of the executor showed it as income and under the law of the Territory it is required to be kept separate. Respondent's Exhibit "A" (R. 93-94) contains the receipts and disbursements of the petitioner for the taxable year as shown on the books of account of the executor.

The testimony with regard to the same of Mr. Ernest R. Cameron (R. 46) stated that this document taken from the books of the petitioner showed the \$20,504.58 to be the balance of income realized by the taxpayer in the taxable year which was on hand at the time of the final distribution.

The case of *Burnet v. Whitehouse*, 283 U. S. 148, cited by petitioner on review (Br. 8) is not in point. That relates only to annuities. The payments to the widow and grandchildren are not here in question. The issue here involved concerns only the distribution by the executor to the testamentary trustee. Nor is the case of *Spreckels v. Comm.*, 101 F. (2d) 721, or the case of *Lynchburg Trust & Savings Bank v. Comm.*, 68 F. (2d) 356 (cited Br. 9) in point.

In the *Spreckels* case the income of a testamentary trust was to be accumulated and paid to the beneficiaries as each reached his majority. The question dealt with income which was to be accumulated for future distribution and was governed by Section 162(b) of the Internal Revenue Act, whereas the present case deals with income of estates in administration paid out during administration and is governed by Section 162(c) of the Internal Revenue Act.

In the *Lynchburg* case it was held that where under a will the income of the residuary trust is to be paid out and there is discretion in the trustee to withhold it, and where the amounts withheld were deposited in separate accounts for the account of the beneficiaries, the amounts paid by the trustee into such funds were

properly paid or credited and were deductible by the trustee. We do not see any application of that case to the present case.

In the case of *County National Bank and Trust Company v. Helvering*, 122 F. (2d) 29 (C.A. D.C.) (cited Br. 9) there was no testamentary trust involved. All the residuary estate was directly distributable to the beneficiary without the intervention of a trust. There the Commissioner attempted to tax the beneficiary for income of the estate which he claimed was distributed to him in an amount in excess of the amount actually distributed to him. The normal income of the estate had been reduced by a capital loss and the actual net income was distributed to the beneficiary. The Commissioner disallowed the capital loss as an item affecting the corpus of the estate, thereby increasing the taxable net income of the estate, all of which he attempted to tax to the beneficiary. It was held, however, that since the beneficiary only received the net income of the estate and not the taxable net income as determined by the Commissioner, he was not taxable on any amount in excess of that received by him. Again, we do not see how that case is applicable to the present case.

In the case of *Buckner v. Comm.*, 45 B. T. A. No. 90, cited by petitioner on review (Br. 10), the Commissioner claimed that the trust was a member of a partnership and that the beneficiary was taxable for her distributive share of the profits of the partnership. The Board held sustaining the taxpayer's contentions

that no distribution had been made by the estate to the trust and that the estate was the member of the partnership, and that, therefore, under Section 162(c) the beneficiary could only be taxed on what was received by her from the executor and that the amount so paid to her was deductible by the estate.

There is nothing in the will which indicates any intent on the part of the testator other than that the income should be paid to the beneficiaries beginning at the date of death, in accordance with the law of the Territory. The will of John A. McCandless provides for payments by the executor of \$1000 per month to his wife and of \$250 per month to each of four named grandchildren during the administration of the estate and until such time as the residuary estate has been distributed to the trustee. The residue and remainder of the estate after certain specific bequests was given to the trustee, who was directed to pay and deliver from the accumulations and net income of the trust estate \$1000 per month to the widow and \$250 per month to each of the four named grandchildren, the first of such payments to be made one month after the last monthly payment made by the executor. The will further provided that in the event of any emergency arising, whether from illness, necessity for special or surgical care or any other emergency of any kind or sort which the trustee in its sole discretion may consider vitally affecting the welfare of the wife or all or any of testator's grandchildren, or if the trustee shall decide that it is necessary or useful to provide for

further education for any or all of said grandchildren, then and in any such event and as often as the same shall occur the trustee is authorized to pay out of the accumulations and income of the trust estate a larger share than the monthly payments therein provided.

It is thus seen that not only is there nothing in the will which indicates any intention that the decedent intended the income of the residuary estate during the period of administration to be anything but income in the hands of the trustee, but the will itself contains a plan which requires that the income during the period of administration be segregated and keep its character as income, because it is only out of such income and the accumulations of income that the trustee can make the required monthly payments to the named beneficiaries as well as any emergency payments that it may think necessary. All such payments are required to be made from income and accumulations thereof and the first payment is required to be made one month after the last payment by the executor. The amount of income and the accumulations thereof constitute the limit of permissible payments to beneficiaries and it is necessary, therefore, to segregate income in the hands of the trustee. Accordingly, where the will, as here, clearly shows a purpose and necessity for segregating income during the period of administration, it would be all the more true that under the law of the Territory of Hawaii, as set forth *supra*, such income of the estate in administration retains its character as income and remains income in the hands of the trustee.

It should be noted that the scheme of the will, as set forth in paragraphs second, third and eighth (e) and (f), is that payments begin from the time of death and are payable one month after the death. Upon the transfer of the residuary estate to the trustee, the trustee continues to make the payments beginning one month after the last payment by the executor. The will provides a unified scheme whereby income is paid monthly from the time of death, first by the executor and then by the trustee in equal monthly payments until the termination of the trust, without interruption by reason of the close of administration of the estate. The testator has in effect expressed the very intention applied under the rule, namely, that income from the time of his death shall be distributed, and in addition the scheme which he has set forth in his will makes it imperative that the income of the estate during administration be treated as income of the trust. Assume, for example, that the executor made its monthly payments to beneficiaries on the 30th of each month. Assume, as in the present case, that it made its final distribution to the trustee on the 26th of the month. The next payment from income which the trustee would be required to make to beneficiaries would be due on the 30th. It is quite apparent that unless the income of the estate retained its character as income in the hands of the trustee, the trustee might be unable to make the payment required to be made on the 30th of the month and the intention of the testator to make continuous monthly payments without interruption would be thwarted.

The scheme set out in the will in the *Wilcox* case, *supra*, is exactly the same as the scheme set out in the will of John A. McCandless, namely, fixed payments to named beneficiaries payable during administration by the executor and thereafter payable by the trustee out of the income.

It is, therefore, respectfully submitted that the income of the estate in administration upon distribution to the residuary trustee retained its character as income in its hands.

CONCLUSION.

It is therefore respectfully submitted that:

1. It is not necessary that the payment of the income of an estate in administration be made to a legatee, heir or beneficiary as income in order that such income paid may be deducted by the estate in computing its net income.

2. Even if it were necessary that income of an estate in administration be paid to a legatee, heir or beneficiary as income in order to be deductible by the estate in computing its net income, the income here in question was so paid out to the beneficiary as income.

(A) Under the laws of the Territory of Hawaii the income in question retained its character as income upon distribution by the executor of the estate.

(B) Under the provisions of the will the income of the estate retained its character as income when distributed to the testamentary trustee.

Wherefore, respondent on review prays that the decision of the Board of Tax Appeals be affirmed.

Dated, Honolulu, T. H.,

February 13, 1942.

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No. 10035

9/21

United States
Circuit Court of Appeals

admitted to practice
of law.

For the Ninth Circuit.

THE B. F. GOODRICH COMPANY, a corpora-
tion,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

MAY 11 1942

PAUL F. O'BRIEN,

United States
Circuit Court of Appeals

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THE B. F. GOODRICH COMPANY, a corporation,

Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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WILLIAM FLEET PALMER, Esq.,
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Assistant United States Attorney,
600 U. S. Post Office and Court House
Building,
Los Angeles, California. [1*]

*Page numbering appearing at foot of page of original certified
Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division.

In Law No. 8138-M

THE B. F. GOODRICH COMPANY, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PETITION.

(Action for money had and received—For recovery of taxes erroneously collected)

Comes now plaintiff, The B. F. Goodrich Company, a corporation, and for its cause of action alleges:

I.

This action is brought against the United States of America as defendant for the reason that the person, namely John P. Carter, who was Collector of Internal Revenue at Los Angeles, California, for the Sixth District of California, at the time of payment under protest of the amounts for the recovery of which this action is brought, died prior to the commencement of this action and on or about the 24th day of April, 1935.

II.

Plaintiff now is and at all times hereinafter mentioned was a corporation organized and existing

under and by virtue of the laws of the State of New York; that it is qualified to do business in the State of California, and has its principal office and place of business at Akron, Ohio, with an office in Los Angeles, California.

That defendant herein, the United States of America, now is and at all times mentioned herein was a body politic.

III.

That on June 30, 1934, plaintiff became owner of all the rights, claims and choses in action of every nature and description [2] which the Pacific Goodrich Rubber Company then had against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter, under an assignment from the said Pacific Goodrich Rubber Company to the plaintiff, in which all of the assets above described were sold, transferred, assigned and set over to the plaintiff, all as is shown by copy of said assignment, a full, true and correct copy of which assignment herein-after follows, is hereby referred to and made a part of this petition.

“ASSIGNMENT

Know All Men by These Presents that Pacific Goodrich Rubber Company, a corporation duly organized and existing under the laws of the State of Delaware and having its general offices at Los Angeles, California, for good

and valuable considerations enuring to its benefit and herewith acknowledged, does hereby assign, transfer and set over to The B. F. Goodrich Company, a New York corporation, all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have against any and all persons, firms or corporations, whether now due and payable or hereafter becoming due and payable including, but without limiting the generality of the foregoing, all bills or accounts receivable, outstanding contracts, insurance policies, bank accounts, stocks, bonds, or other interest in other firms, companies and/or businesses, also all cash, trade marks, trade names, patents, leases, merchandise, raw materials, supplies and equipment.

To Have and to Hold the same unto the said The B. F. Goodrich Company, its successors and assigns forever.

Said Pacific Goodrich Rubber Company has nominated, constituted and appointed and by these presents does nominate, constitute and appoint said The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company to claim, demand payment and/or collect all such claims and amounts and otherwise to prosecute any

proceedings at law or in equity therefor and to give effectual discharge thereof.

And said Pacific Goodrich Rubber Company does hereby agree that it will at any time or from time to time hereafter at the request of said The B. F. Goodrich Company make, do and execute all such further acts and instruments as may be necessary, convenient and proper to enable The B. F. Goodrich Company to recover said claims and amounts hereinabove referred to, title to which is hereby vested or intended to be vested in said The B. F. Goodrich Company.

In Witness Whereof, Pacific Goodrich Rubber Company has caused these presents to be signed in its name and on its behalf and its corporate seal to be affixed hereto by its President and Secretary as of the 30th day of June, 1934.

Attest:

S. M. JETT

Secretary.

PACIFIC GOODRICH
RUBBER COMPANY,

By J. D. TEW

President." [3]

IV.

That during his lifetime and during the time when the amounts herein paid were sought to be recovered, John P. Carter was the duly appointed

qualified and acting Collector of Internal Revenue for the Sixth District of California.

V.

That this is an action arising under the laws of the United States levying and providing for the collection of internal revenue, and more particularly under the Act of June 6, 1932, Chapter 209, Section 202, 47 Stat. 261, as modified by the Act of August 12, 1933, Chapter 25, Section 9(a), 48 Stat. 35, and is for the recovery of a manufacturer's excise tax on rubber tires or casings erroneously and illegally collected from the Plaintiff by the Defendant.

VI.

That under Section 16 of the Agricultural Adjustment Act (Public No. 10, 73d Congress), the plaintiff was required to pay a tax upon the sale or other disposition of any article processed wholly or in chief value from cotton which it had on hand or in transit to it on August 1, 1933, (the date the processing tax on cotton went into effect by proclamation of the Secretary of Agriculture), in an amount equivalent to the tax which would have been paid on said cotton had it actually been processed after August 1, 1933, i. e., \$0.044184 per pound; that under Section 9(a) of said Agricultural Adjustment Act, plaintiff was allowed to compute the manufacturer's excise tax on tires levied by Section 602 of the Revenue Act of 1932

by deducting from the weight of said tires the weight of processed cotton in said tires upon which a processing tax had been paid under Section 9(a) or Section 16(a) of the Agricultural Adjustment Act.

VII.

That said defendant and said Collector of Internal Revenue refused to permit plaintiff to take credit against excise [4] tax on articles processed wholly or in chief value from cotton in its inventory on August 1, 1933, despite the fact that the processing tax had theretofore been duly paid by the plaintiff upon cotton contained in such articles under Section 16(a) of the Agricultural Adjustment Act, and said defendant and said Collector of Internal Revenue erroneously and illegally demanded payment by plaintiff of \$..... with interest of \$....., and said defendant and said Collector of Internal Revenue erroneously collected from plaintiff, and the same was turned over to defendant, the sum of \$15,880.64 on or about April 17, 1934, and \$569.75 on or about July 27, 1934.

VIII.

That plaintiff, on or about the day of August, 1935, duly filed with Nat Rogan, successor of said deceased Collector of Internal Revenue, as Collector of Internal Revenue for the Sixth District of California, in Los Angeles, its Claim for Refund of said tax and interest in the aggregate sum of \$16,450.39, paid by plaintiff on

April 17, 1934, and July 27, 1934, as set out above, together with interest thereon from the date of such erroneous payment to the date of the allowance of refund, and that the grounds set forth in said Claim for Refund were as follows:

“Under the provisions of this section, (9(a) of the Agricultural Adjustment Act), the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the Commissioner’s construction of Section 9 of the Agricultural Adjustment Act to the effect that the taxpayer is not entitled to the credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a proper construction of the Section 9 of the Agricultural Adjustment Act entitled taxpayer to a credit of the amount of tax and interest above claimed.”

That a full, true and correct copy of said Claim hereinafter follows, is hereby referred to and by this reference is incorporated herein and made a part of this petition. [5]

AMENDED CLAIM

Form 843

Treasury Department

Internal Revenue Service

Revised June, 1930

To Be Filed with the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below
the kind of claim filed, and fill in the certificate on
the reverse side.

() Refund of Tax Illegally Collected.

() Refund of Amount Paid for Stamps Un-
used, or Used in Error or Excess.

() Abatement of Tax Assessed (not applicable
to estate or income taxes).

State of Ohio,

County of Summit—ss:

Name of taxpayer or purchaser of stamps—The
B. F. Goodrich Company.

Business address—(Street) 5400 E. Ninth Street,
(City) Los Angeles, (State) Calif.

Residence.....

The deponent, being duly sworn according to
law, deposes and says that this statement is made
on behalf of the taxpayer named, and that the
facts given below are true and complete:

1. District in which return (if any) was filed—
Los Angeles, California.

2. Period (if for income tax, make separate form for each taxable year) from....., 19....., to....., 19.....

3. Character of assessment or tax—Excise tax.

4. Amount of assessment, \$16,450.39; dates of payment April 17, July 27, 1934.

5. Date stamps were purchased from the Government

6. Amount to be refunded, \$16,450.39 plus interest

7. Amount to be abated (not applicable to income or estate taxes) \$.....

8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

During the period from August 1, 1933 through September 30, 1933, the taxpayer manufactured and sold tires which contained some 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue for the 6th District of California, a so-called floor tax levied by Section 16 of the Agricultural Adjustment Act, at the rate of \$.044184 per pound. That in computing the excise tax levied by Section 602 of the Revenue Act of 1932 upon tires manufactured and sold subsequent to August 1, 1933, taxpayer took a deduction from said excise tax in accordance with the provisions of Section 9 of the Agricultural Adjustment Act,

that is, it arrived at excise tax due by deducting from the weight of the tires manufactured and sold after August 1, 1933, the weight of processed cotton in said tires upon which a so-called floor tax had been paid under Section 16 of the Agricultural Adjustment Act. Upon an examination of taxpayer's records, the Commissioner of Internal Revenue assessed the tax above described against the taxpayer upon the theory that the provisions of Section 9 of the Agricultural Adjustment Act did not apply to articles upon which a floor stock tax had been paid under the provisions of Section 16 of said Act. The taxpayer did not include the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. Neither did it collect the amount of said tax from the persons to whom the articles in question were sold. That a proper interpretation of Section 9 of the Agricultural Adjustment Act entitles the taxpayer to the credit taken by it upon its excise tax returns by reason of the payment of the so-called floor-tax. The taxpayer insists that the words "processing tax" as used in Section 9 of the Agricultural Adjustment Act mean any and all taxes levied under and by the general scheme of the processing taxes and that "processing taxes" as used throughout the Agricultural Adjustment Act mean not only the tax which accrued upon the processing of the article in question but the so-called floor tax levied in order to prevent processors from escaping or avoiding the

taxes levied under said Agricultural Adjustment Act, and that Congress intended that the credit granted under said Section 9 of the Agricultural Adjustment Act should apply wherever any processing or floor stock tax had been paid.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company, a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company, to ask, demand, or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof. [6]

Certificate

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

[Form not filled in]

I certify that the records of this office show the following facts as to the purchase of stamps:

[Form not filled in]

Instructions

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing

that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation. [7]

That said Claim was rejected by the Commissioner of Internal Revenue under date of May 22, 1936, along with an amended claim, filed as hereinafter stated.

IX.

That plaintiff, on or about April, 1936, duly filed with Nat Rogan, the successor to said deceased Collector of Internal Revenue, as Collector of Internal Revenue for the Sixth District of California, its amended Claim for Refund of said tax and interest, in the aggregate sum of \$16,450.39, paid by plaintiff as above set forth, and the grounds set forth in said Amended Claim were as follows:

“During the period from August 1, 1933 through September 30, 1933, the taxpayer manufactured and sold tires which contained some 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue for the Sixth District of California, a so-called floor tax levied by Section 16 of the Agricultural Adjustment Act, at the rate of \$.044184 per pound. That in computing the excise tax levied by Section 602 of the Revenue Act of 1932 upon

tires manufactured and sold subsequent to August 1, 1933, taxpayer took a deduction from said excise tax in accordance with the provisions of Section 9 of the Agricultural Adjustment Act, that is, it arrived at excise tax due by deducting from the weight of the tires manufactured and sold after August 1, 1933, the weight of processed cotton in said tires upon which a so-called floor tax had been paid under Section 16 of the Agricultural Adjustment Act. Upon an examination of taxpayer's records, the Commissioner of Internal Revenue assessed the tax above described against the taxpayer upon the theory that the provisions of Section 9 of the Agricultural Adjustment Act did not apply to articles upon which a floor stock tax had been paid under the provisions of Section 16 of the said Act. The taxpayer did not include the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. Neither did it collect the amount of said tax from the persons to whom the articles in question were sold. That a proper interpretation of Section 9 of the Agricultural Adjustment Act entitles the taxpayer to the credit taken by it upon its excise tax returns by reason of the payment of the so-called floor tax. The taxpayer insists that the words "processing tax" as used in Section 9 of the Agricultural Adjustment Act mean any and all taxes

levied under and by the general scheme of the processing taxes and that "processing taxes" as used throughout the Agricultural Adjustment Act mean not only the tax which accrued upon the processing of the article in question but the so-called floor tax levied in order to prevent processors from escaping or avoiding the taxes levied under said Agricultural Adjustment Act, and that Congress intended that the credit granted under said Section 9 of the Agricultural Adjustment Act should apply wherever any processing or floor stock tax had been paid."

That a full, true and correct copy of said Amended Claim hereinafter follows, is hereby referred to and is by reference incorporated herein and made a part hereof. [8]

CLAIM

Form 843

Treasury Department

Internal Revenue Service

Revised June, 1930

To be filed with the Collector where Assessment
was made or tax paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

(x) Refund of tax illegally collected.

() Refund of amount paid for stamps unused,
or used in error or excess.

() Abatement of tax assessed (not applicable
to estate or income taxes).

State of Ohio,

County of Summit—ss.

Name of Taxpayer or purchaser of stamps The
B. F. Goodrich Company.

Business address 5400 E. Ninth Street,

(Street)

Los Angeles, California.

(City) (State)

Residence.....

The deponent, being duly sworn according to law,
deposes and says that this statement is made on
behalf of the taxpayer named, and that the facts
given below are true and complete:

1. District in which return (if any) was filed
Los Angeles, California.

2. Period (if for income tax, make separate form
for each taxable year) from....., 19..., to
....., 19....

3. Character of assessment or tax excise tax.

4. Amount of assessment, \$16,450.39; dates of
payment April 17; July 27, 1934.

5. Date stamps were purchased from the Govern-
ment.....

6. Amount to be refunded.....\$16,450.39
plus interest.

7. Amount to be abated (not applicable to income or estate taxes).....\$.....

8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

Section 9 of the Agricultural Adjustment Act (H. R. 3835) provides: "That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of such finished article less the weight of the processed cotton contained therein, on which a processing tax has been paid." Under the provisions of this section, the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the Commissioner's construction of Section 9 of the Agricultural Adjustment Act to the effect that taxpayer is not entitled to a credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a proper construction of the Section 9 of the Agricultural Adjustment Act entitles taxpayer to a credit of the amount of tax and interest above claimed.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company,

a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company, to ask, demand or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof. [9]

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

[Form not filled in]

I certify that the records of this office show the following facts as to the purchase of stamps:

[Form not filled in]

Instructions

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts

7. Amount to be abated (not applicable to income or estate taxes).....\$.....

8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

Section 9 of the Agricultural Adjustment Act (H. R. 3835) provides: "That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of such finished article less the weight of the processed cotton contained therein, on which a processing tax has been paid." Under the provisions of this section, the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the Commissioner's construction of Section 9 of the Agricultural Adjustment Act to the effect that taxpayer is not entitled to a credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a proper construction of the Section 9 of the Agricultural Adjustment Act entitles taxpayer to a credit of the amount of tax and interest above claimed.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company,

a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company, to ask, demand or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof. [9]

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

[Form not filled in]

I certify that the records of this office show the following facts as to the purchase of stamps:

[Form not filled in]

Instructions

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts

sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation. [10]

X.

That on or about May 25, 1936, plaintiff received from The Commissioner of Internal Revenue a notice dated May 22, 1936, that the said Amended Claim for Refund of said additional assessment and interest was rejected by the Commissioner of Internal Revenue on May 22, 1936, and neither said amount collected from plaintiff nor any part thereof has been repaid to the plaintiff.

XI.

That on August 1, 1933, the plaintiff held for sale or other disposition articles processed wholly or in chief value from cotton, to-wit, tire fabric, thread and other materials having a total cotton content of 784,177 pounds; that the plaintiff, according to law and the Regulations of the Secretary of the Treasury, promulgated in pursuance to said law, duly prepared and filed with said John P. Carter, Collector of Internal Revenue, its return and amended return showing said cotton content in detail, and paid to said Collector of Internal Revenue for defendant, and the same was paid and turned over to defendant by said Collector of Internal Revenue, a tax thereon at the rate of \$0.044184 per pound, which was the rate fixed by the Secretary of Agriculture in accordance with the provisions of the Agricultural Adjustment Act; that plaintiff paid to said Collector of Internal Revenue for defendant and the same was paid and turned

over to defendant under said return, the sum of \$34,648.08 in four installments as follows:

August 31, 1933.....	\$ 7,368.06
September 30, 1933.....	7,368.06
October 31, 1933.....	11,249.98
November 30, 1933.....	8,662.03

That despite the fact that the tax levied and collected was erroneously and illegally levied and collected, no part of the above named tax has been received by, refunded or credited to the plaintiff.

[11]

XII.

That from August 1st through the 15th day of September, 1933, the plaintiff manufactured and sold tires which contained 757,260 pounds of the above mentioned 784, 177 pounds of articles processed wholly or in part from cotton and which was in plaintiff's inventory, and, on August 1, 1933, being held for sale or other disposition by the plaintiff, and upon which a tax at the rate of \$0.044184 per pound had been paid as above set forth.

XIII.

That for the months of August, September, October, November and December, 1933, the plaintiff filed with said John P. Carter, Collector of Internal Revenue, its manufacturers' excise tax returns in accordance with the law and regulations of the Secretary of the Treasury, and paid to said Col-

lector of Internal Revenue for and the same was paid and turned over to defendant, the taxes disclosed by said returns to be due and owing on the tires sold during said months, under the provisions of Section 602 of the Revenue Act of 1932; that the plaintiff computed the aforesaid taxes by deducting from the weight of the tires so sold the weight of the articles processed wholly or in chief value from cotton, contained therein, including in said deduction the above described 757,260 pounds of articles processed wholly or in chief value from cotton upon which a tax had theretofore been paid at the rate of \$0.044184 per pound as hereinbefore alleged. That on or about April 1934, the defendant and the said Collector of Internal Revenue for defendant assessed an additional manufacturer's excise tax against plaintiff for the months of November and December, 1933, in the sum of \$15,880.64, with interest in the sum of \$569.75, and that said additional assessment erroneously and illegally included an additional excise tax at the rate of $2\frac{1}{4}\text{c}$ per pound upon said 757,260 pounds of articles processed wholly or in chief value from cotton, which amount the plaintiff had [12] deducted from the weight of tires sold by it during the months of August and September, 1933, as above alleged.

XIV.

Upon demand by defendant and said John P. Carter, Collector of Internal Revenue, plaintiff on

April 17, 1934, paid to said Collector of Internal Revenue for, and the same was paid and turned over to defendant, the sum of \$15,880.64, and on July 27, 1934, paid to said Collector of Internal Revenue for, and the same was paid and turned over to defendant, interest according to the said demand in the sum of \$569.75; that said payments were made by the plaintiff under protest that such assessment was erroneous and illegal and was made solely to avoid interest and penalty, of which fact the defendant was duly advised at the time of said payments.

XV.

That at the time said additional tax was assessed, the defendant and the said John P. Carter, Collector of Internal Revenue, for convenience in arriving at the additional tax and interest which defendant and said Collector of Internal Revenue claimed to be due from plaintiff to defendant, determined that such assessment should be levied for the months of November and December; that the plaintiff did not object to this action if assessment were to be made, but did object to any additional assessment being made.

XVI.

That plaintiff has not included any of the tax which it herein seeks to recover in the price of the article with respect to which the said tax was imposed nor has it collected the amount of the said tax from the vendees of said article.

XVII.

That by reason of the premises, defendant became and is indebted to plaintiff in the sum of \$16,450.39, together with interest, after allowing all just credits and offsets. [13]

XVIII.

That plaintiff is and always has been the sole owner of the Claim herein referred to since June 30, 1934, and has not assigned or transferred said claim or any part thereof or any interest therein.

Wherefore, the plaintiff prays judgment against the defendant, United States of America, in the sum of \$16,450.39, with interest thereon at the rate of six per cent (6%) per annum, upon the sum of \$15,880.64 from April 17, 1934, and interest at said rate upon the sum of \$569.75 from July 27, 1934.

THE B. F. GOODRICH
COMPANY

By ANDREWS, BLANCHE
& KLINE,

And EUGENE H. BLANCHE
Its Attorneys

[Endorsed]: Filed Oct. 1, 1937. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy. [14]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAILING—
(PETITION)

State of California,
County of Los Angeles—ss.

Blanche Swan, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 414 Union Oil Building, 617 West 7th Street, Los Angeles, California; that on the 5th day of October, 1937, affiant served the Petition on file in this action by placing a true copy thereof in an envelope addressed as follows: "Honorable Homer C. Cummings, United States Attorney General, Washington, D. C." and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, and that said envelope was mailed to said Homer C. Cummings by registered mail.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

BLANCHE SWAN

Subscribed and sworn to before me this 5th day of October, 1937.

[Seal] GRACE S. WILDERS
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Oct. 6, 1937. R. S. Zimmerman, Clerk, By L. B. Figg, Deputy Clerk. [15]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE—(PETITION)

State of California,
County of Los Angeles—ss.

Harry A. Mayhew, being first duly sworn, deposes and says:

I am and was on the date herein mentioned over the age of eighteen years and not a party to the above entitled action; that I personally served the Petition on file in said action by delivering to and leaving with the following named person, in the City of Los Angeles, County of Los Angeles, State of California, on the date set opposite his name, a true copy thereof, to-wit:

E. H. Mitchell, Assistant United States Attorney
October 4, 1937.

HARRY A. MAYHEW

Subscribed and sworn to before me this 4th day of October, 1937.

[Seal] GRACE S. WILDERS

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Oct. 6, 1937. R. S. Zimmerman, Clerk, By L. B. Figg, Deputy Clerk. [16]

[Title of District Court and Cause.]

DEMURRER

Comes Now the defendant, United States of America, by Ben Harrison as United States Attorney in and for the Southern District of California, and Francis C. Whelan, Assistant United States Attorney for said District, its attorneys, and respectfully demurs to plaintiff's Petition filed herein, and for grounds for said demurrer says:

1. On June 16, 1936, there was enacted by Congress the Revenue Act of 1936 (H. R. 12395, Public No. 740, 74th Cong., Title 7, U. S. C. A. § 644 et seq.) which was signed by the President of the United States and became effective on June 22, 1936, under the provisions of which this Court is now without jurisdiction of the matters and things of which plaintiff complains, and to render judgment in favor of plaintiff and against defendant herein for that:

(a) Congress by Section 903 of said Revenue Act of 1936 has made the filing of a claim for refund by plaintiff with the Commissioner of Internal Revenue after June 22, 1936, and prior to July 1, 1937, setting forth clearly under oath all the evidence relied upon in support of said claim, a condition precedent to the maintenance of this suit in the absence of which this Court is without jurisdiction to entertain this suit.

(b) Congress by Section 904 of said Revenue [17] Act of 1936 has provided that (except as to processing taxes as defined in the Act of 1936 as hereinafter more particularly set forth) no suit or proceeding whether brought before or after June 22, 1936, for the recovery, recoupment, set-off, refund or credit, or counter-claim, of any amount paid by or collected from any person as a tax under the Agricultural Adjustment Act shall be maintained in any Court if brought before the expiration of eighteen months from the date of the filing of the claim for refund required to be filed by Section 903 of the Act, unless the Commissioner renders a decision thereon within that time, or after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant, notice of disallowance of that part of the claim to which such suit or proceeding relates.

The effect of said Section 904 (Title 7 U. S. C. A. § 646) is to deprive this Court of jurisdiction to herein determine this suit, since it affirmatively appears from the face of the Petition that no such decision by the Commissioner of Internal Revenue or no such claim has or have been made.

(c) Congress by Sections 905 and 906 (Title 7 U. S. C. A., §§ 647 and 648) of said Revenue Act of 1936 has deprived this Court of Jurisdiction to hear and determine the matters set forth in plaintiff's Petition covering the amounts paid or collected from plaintiff as processing taxes under the Agricultural Adjustment Act.

(d) Congress by Section 906 of said Revenue Act of 1936 has conferred exclusive jurisdiction to hear and determine the matters set forth in [18] plaintiff's Petition covering the amounts paid or collected as processing taxes from plaintiff under the Agricultural Adjustment Act upon a Board of Review established pursuant to subdivision (b) thereof subject to review on petition filed by plaintiff or the Commissioner of Internal Revenue as provided in subdivision (g) of said Section 906 by the Circuit Court of Appeals of the United States where the claimant resides, or by agreement of plaintiff and the Commissioner of Internal Revenue in the United States Court of Appeals for the District of Columbia.

2. Plaintiff's said Petition does not state facts sufficient to constitute a cause of action against this defendant for the following reasons:

(a) It affirmatively appears from the allegations of plaintiff's Petition that plaintiff has not complied with the provisions laid down by Congress in Sections 902, 903 ,904 and 906, respectively, and each subdivision thereof, respectively, of the Revenue Act of 1936, each of which sections and subdivisions thereof is hereby by reference adopted and made part hereof as if specifically herein set forth.

(b) Plaintiff's said Petition does not state any facts which would warrant a judgment by this Court against this defendant and in favor of plaintiff.

BEN HARRISON

United States Attorney

FRANCIS C. WHELAN

Assistant U. S. Attorney

Attorneys for

Defendant.

[Endorsed]: Filed Dec. 3, 1937. [19]

POINTS AND AUTHORITIES
IN SUPPORT OF DEMURRER.

I.

This Court is without jurisdiction to entertain this action in so far as it relates to the recovery of amounts paid as processing taxes. Section 906, Revenue Act of 1936 (hereto appended).

II.

The withdrawal from the District Courts of jurisdiction to entertain suits for recovery of amounts paid as processing taxes has deprived plaintiff of no constitutional rights.

Anniston Mfg. Co. v. Davis, 301 U. S. 337.

III.

This Court is without jurisdiction to pass upon plaintiff's claim for refund of floor stocks taxes.

A. Section 903 of the Revenue Act provides that unless certain procedural steps are taken by claimant, no refund of amounts paid as taxes shall be allowed and no suit shall be brought or maintained for recovery of any amount paid as a tax.

B. The requirements have not been complied with by plaintiff, and its suit is premature.

C. Conditions precedent to the right to sue the United States are validly imposed.

Anniston Mfg. Co. v. Davis, *supra*.

D. Compliance with conditions precedent must be alleged.

Arnson v. Murphy, 115 U. S. 579, 584, 586.

1. Compliance with conditions precedent of Sections 903 and 904 of the Revenue Act have not been alleged.

2. Elements required by Section 902 of the Act have not been alleged.

[Endorsed]: Filed Dec. 3, 1937. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [20]

[Title of District Court and Cause.]

AMENDMENT TO DEMURRER.

Comes now the defendant United States of America, by Ben Harrison, United States Attorney for the Southern District of California, and Francis C. Whelan, Assistant United States Attorney for the Southern District of California, and respectfully moves the following amendment to defendant's demurrer already on file, on the following grounds:

3. That it does not appear from the bill of complaint on file herein that a valid assignment has been made of the subject matter of the claim alleged in said bill by the Pacific Goodrich Rubber Company to complainant

herein, as required by Section 203, Title 31 U. S. Code; and that it affirmatively appears from the face of said bill of complaint that plaintiff does not rely upon a valid assignment of the claim alleged in plaintiff's bill of complaint as required by said Title 31, Section 203 U. S. Code; and that plaintiff's bill of complaint does not state a cause of action against this defendant for such reason.

Wherefore, defendant prays that plaintiff's bill of complaint be dismissed for the grounds set forth in defendant's demurrer already on file and in this amendment to demurrer.

Respectfully submitted,

BEN HARRISON,

United States Attorney,

FRANCIS C. WHELAN,

Assistant U. S. Attorney,

Attorneys for Defendant.

[Endorsed]: Filed Apr. 6, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [21]

[Title of District Court and Cause.]

AMENDMENT TO PETITION

Pursuant to court Order dated May 21, 1938, plaintiff The B. F. Goodrich Company, a corporation, amends its petition on file herein by adding to paragraph III at the end thereof the following allegation:

In addition to the foregoing assignment and as a supplement thereof, there was executed by Pacific Goodrich Rubber Company, on the 14th day of August, 1935, a further document assigning unto The B. F. Goodrich Company all the rights, claims and choses in action of every nature and description which the Pacific Goodrich Rubber Company then had against all persons, firms or corporations, whether then due and payable or should later accrue, all as shown by a copy of said document, a full, true and correct copy of which hereinafter follows, and is hereby referred to and made a part of the amended petition:

“For value received, the undersigned, Pacific Goodrich Rubber Company, does hereby sell, assign and transfer unto The B. F. Goodrich Company, all claims, demands, choses in action or cause or causes of action of whatsoever kind and nature which it has or which may later accrue against all persons whomsoever, particularly its claim for refund of excise tax illegally paid to the United States Government

from and after April 17, 1934, in the sum of \$16,450.39, or any one sum finally found [22] to be due, together with interest thereon.

The assignor does by these presents, hereby nominate, constitute and appoint the said The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of the undersigned, to claim, demand payment and/or collect all such claims and amounts and particularly, said claim for excise tax illegally paid to the United States Government, and otherwise to prosecute any and all proceedings at law or in equity therefor and to take such other action as may be necessary or appropriate to settle, compromise and/or collect said claim or claims, and further, to give effectual discharge of said claim or claims.

In Witness Whereof, the undersigned has hereunto attached its hand and seal this the 14th day of August, 1935.

PACIFIC GOODRICH RUBBER
COMPANY,

(Seal)

By J. D. TEW,

President.

By S. M. JETT,

Secretary.

F. C. LESLIE

F. M. SEIFERT

State of Ohio,
County of Summit—ss.

Before me, a Notary Public in and for said County, personally appeared J. D. Tew, President, and S. M. Jett, Secretary of the Pacific Goodrich Rubber Company, the corporation which executed the foregoing instrument, who acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as such President and Secretary in behalf of said corporation and by authority of its board of directors; and that said instrument is their free act and deed individually and as such President and Secretary and the free and corporate act and deed of said the Pacific Goodrich Rubber Company.

In Testimony Whereof, I have hereunto subscribed my name and affixed my official seal at Akron, Ohio, this 14th day of August, 1935.

ALBERTA M. TEWERS,

Notary Public.

My Commission expires Dec. 15, 1935."

(Seal) [23]

That in all other particulars said petition shall be and remain in the form as on file herein.

Dated: May 21st, 1938.

THE B. F. GOODRICH COMPANY,
By: ANDREWS, BLANCHE & KLINE
and EUGENE H. BLANCHE,
Attorneys for Plaintiff.

[Endorsed]: Filed May 21, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy. [24]

[Title of District Court and Cause.]

ORDER

For good cause shown, It Is Hereby Ordered that the petition on file in the above entitled action shall be amended in the particulars as set forth in the hereunto attached Amendment to Petition.

Dated: May 21, 1938.

WM. P. JAMES,
Judge.

[Endorsed]: Filed May 21, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy. [25]

[Title of District Court and Cause.]

SECOND
AMENDMENT TO DEMURRER

Comes Now the defendant, United States of America, by its attorneys Ben Harrison, United States Attorney, and Francis C. Whelan, Asst. United States Attorney, and moves this amendment to its demurrer now on file herein.

I.

Defendant hereby demurs to plaintiff's complaint, as amended, upon the grounds and reasons heretofore set forth in defendant's Demurrer, as already amended on file herein, and by reference incorporates all of the same herein.

BEN HARRISON,

United States Attorney.

FRANCIS C. WHELAN,

Asst. United States Attorney,
Attorneys for defendant.

Received copy of above document. Andrews Blanche & Kline. By H. A. Mayhew.

[Endorsed]: Filed Aug. 1, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [26]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR ORDER
SUSTAINING DEMURRER.

To: The B. F. Goodrich Company, a corporation;
and

To: Andrews, Blanche & Kline and Eugene H.
Blanche, its attorneys:

You, and each of you, will please take notice that the defendant United States of America will move the above entitled court on the 3rd day of October, 1928, at 10 o'clock A. M., before the Honorable Paul J. McCormick, United States District Judge, in Room 588 Pacific Electric Building, Los Angeles, California, for its order sustaining defendant's Demurrer to plaintiff's Bill of Complaint herein.

Dated: August 8, 1938.

UNITED STATES OF AMERICA,
By BEN HARRISON,
United States Attorney,
FRANCIS C. WHELAN,
Asst. United States Attorney.

[Endorsed]: Filed Aug. 9, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [27]

At a stated term, to-wit: The September Term, A. D. 1938, of the District Court of the United States of America, within and for the Central

Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 3rd day of October in the year of our Lord one thousand nine hundred and thirty-eight.

Present:

The Honorable: Paul J. McCormick, District Judge.

[Title of Cause.]

This cause coming on for hearing on demurrer; F. C. Whelan, Assistant U. S. Attorney, appearing for the Government; F. C. Leslie, Esq., appearing for the plaintiff:

Attorney Whelan makes a statement in support of the said demurrer, and Attorney Leslie makes a statement in opposition.

It is, thereupon, ordered that the demurrer be, and it is, overruled, and thirty (30) days are allowed in which to answer. [28]

[Title of District Court and Cause.]

ANSWER

Comes now defendant, United States of America, and for answer to plaintiff's petition, as amended, denies, admits and alleges as follows:

First Answer and Defense.

I.

Answering paragraph III of said petition as amended this defendant does not have sufficient

information or belief to enable it to answer the allegations of said paragraph and therefore, basing its denial upon that ground, denies each and every allegation of said paragraph III as amended.

II.

Answering paragraph V of said petition this answering defendant denies that this is an action for recovery of a manufacturer's excise tax on rubber tires or casings erroneously or illegally collected from the plaintiff by the defendant, and alleges that this action is in fact an action for the recovery of floor stock taxes collected from the plaintiff by the defendant under the provisions of the Agricultural Adjustment Act, (Act of May 12, 1933; Title 7 U. S. C. Sec. 616).

III.

Answering the allegations of paragraph VI of said petition, this answering defendant denies that plaintiff was allowed to compute the manufacturer's excise tax on tires levied by Section 602 of the [29] Revenue Act of 1932 by deducting from the weight of said tires the weight of processed cotton in said tires unless said cotton had been processed after August 1, 1933.

Further answering the allegations of said paragraph VI this defendant alleges that under the provisions of Title 7 U. S. C. Sec 609, Act of May 12, 1933, commonly known as the Agricultural Adjustment Act, it was provided that upon any article upon which a manufacturer's sale tax is levied

under the authority of Chapter 20 of Title 26, and which manufacturer's sales tax is computed on the basis of weight, such manufacturer's sales tax shall be computed on the basis of the weight of said mentioned article less the weight of the processed cotton therein on which a processing tax has been paid; this defendant further alleges that neither plaintiff nor plaintiff's assignor paid any processing tax upon the cotton referred to in plaintiff's complaint and defendant alleges that any sums paid under the Agricultural Adjustment Act respecting said cotton by plaintiff or plaintiff's assignor were paid as floor stock taxes and that there is no provision in said Agricultural Adjustment Act or otherwise allowing for a deduction from any amounts due as tax under the authority of Chapter 20 of Title 26 United States Code, on account of the payment of any floor stock taxes paid under the Agricultural Adjustment Act.

IV.

Answering paragraph VII of said petition this defendant denies that this defendant and/or the Collector of Internal Revenue erroneously and/or illegally demanded payment by plaintiff of any sum or sums, and denies that said defendant and/or said Collector of Internal Revenue erroneously collected from plaintiff any sum or sums; and denies that a processing tax within the meaning of Title 7, U. S. C. Sec. 609 had been paid upon said cotton referred to in said paragraph VII. [30]

V.

Answering paragraph XI of said petition this defendant does not have sufficient information or belief to enable it to answer the allegations of said paragraph as to the amount of tire fabric, thread and/or other materials processed wholly or in chief value from cotton and held by plaintiff for sale on August 1, 1933; therefore, basing its denial upon that ground defendant denies each and every allegation pertaining to the amount of such materials held for sale or other disposition by plaintiff on August 1, 1933; further answering the allegations of said paragraph this defendant denies that any tax levied and/or collected against or from plaintiff under the provisions of the Revenue Act of June 6, 1932, Chapter 209, Section 202; 47 Stat. 261, as modified by the Act of May 12, 1933, Chapter 25, Section 9(a); 48 Stat. 35, Title 7 U. S. C. 609(a), was erroneously and/or illegally levied and/or collected.

VI.

Answering the allegations of paragraph XII of said petition, this answering defendant does not have sufficient information or belief to enable it to answer the allegations of said paragraph not hereinbefore admitted and therefore, basing its denial on that ground, denies each and every allegation of said paragraph not hereinbefore admitted.

VII.

Answering paragraph XIII of said petition this defendant denies that plaintiff filed with the Col-

lector of Internal Revenue therein referred to, for the periods therein referred to, its manufacturer's excise tax returns in accordance with the law and/or regulations of the Secretary of the Treasury; and this defendant denies that the alleged assessment assessed against plaintiff was erroneously and/or illegally made.

VIII.

Answering the allegations of paragraph XVI, this answering de- [31] fendant does not have sufficient information or belief to enable it to answer the allegations of said paragraph and therefore, basing its denial upon that ground, denies each and every allegation of said paragraph.

IX.

Answering the allegations of paragraph XVII of said petition, this defendant denies each and every allegation thereof.

X.

Answering the allegations of paragraph XVIII of said petition, this defendant denies each and every allegation thereof, upon the ground that it does not have sufficient information or belief to enable it to answer the same.

Second Answer and Defense.

For further and affirmative answer and defense, this defendant alleges as follows:

I.

Defendant alleges that this action is in fact one for the recovery of floor stock taxes alleged to have

been levied by the defendant under the provisions of Title 7, U. S. C. Sec. 616, Act of May 12, 1933, Chap. 25, Title 1, Sec. 16, upon certain stocks of processed cotton held for sale or other disposition by Pacific Goodrich Rubber Company, a corporation, on August 1, 1933; that said Act has been held unconstitutional and invalid and that certain procedural steps have been enacted by the Congress of the United States regarding the refund of any moneys paid as taxes under said unconstitutional act, which said act is commonly known as the Agricultural Adjustment Act.

II.

That it is provided by the provisions of the Revenue Act of 1936, Chap. 690, for the procedure required to be taken for refund of any moneys collected under said Agricultural Adjustment Acts that under the provisions of said Revenue Act, Title 7, U. S. C. Sec. 645, it is provided that no refund of any amount paid by or collected from any [32] person as taxes under said Agricultural Adjustment Act shall be made or allowed unless after June 22, 1936, and prior to July 1, 1937, a claim for refund has been filed by said person in accordance with regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. It is further provided by Title 7 U. S. C. Sec. 646, that no suit or proceeding shall be brought or maintained in any court for the recovery of any moneys paid under said Agricultural Adjustment Act before the ex-

piration of eighteen (18) months from the date of filing a claim therefor under Section 645 of Title 7, U. S. C., unless the Commissioner renders a decision thereon within that time or after the expiration of two years from the date of mailing to claimant by the Commissioner a notice of disallowance of that part of the claim to which said suit or proceeding relates.

It is further provided by Section 644 of Title 7, U. S. C. that no refund shall be made or allowed of any amount paid under the provisions of the Agricultural Adjustment Act unless the claimant establishes to the satisfaction of said Commissioner of Internal Revenue that the claimant bore the burden of such amount and has not been relieved thereof, nor reimbursed therefor nor shifted such burden directly or indirectly.

III.

That neither plaintiff nor its alleged assignor herein have filed a claim for refund of said floor stock taxes within the time prescribed by law as aforesaid; that the provisions of said Revenue Act of 1936 relative to the time for filing suit for refund of floor stock taxes have not been complied with herein. Further, this defendant is informed and believes, and therefore alleges, that neither plaintiff nor plaintiff's assignor has borne the burden of such amount now sought to be recovered as required by the aforesaid provisions of the law relating to refunds of moneys paid under the Agricultural Adjustment Act. [33]

This defendant is informed and believes, and therefore alleges that this action is claimed to have been brought under the provisions of the Revenue Act of 1932 in order to evade the requirements of the law relating to the maintenance of suits for recovery of moneys paid under the Agricultural Adjustment Act as set forth in the Revenue Act of 1936.

IV.

This defendant alleges that any deduction attempted to be claimed by plaintiff from amounts taxable under the Revenue Act of 1932 by virtue of the provisions of the said Agricultural Adjustment Act are invalid for the reason that said Agricultural Adjustment Act as to the payment or collection of alleged taxes thereunder has been held to be unconstitutional and null and void and of no effect.

Wherefore, defendant prays that plaintiff take nothing by its complaint and that defendant have its costs of suit and such other and further relief as to the court may seem just and equitable.

BEN HARRISON,

United States Attorney.

FRANCIS C. WHELAN,

Assistant United States
Attorney.

Attorneys for United States
of America.

[Endorsed]: Filed Feb. 3, 1939. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy. [34]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL.

United States of America,
Southern District of California—ss.

Frances E. Barragar, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of Los Angeles County, California; that her business address is 376 Pacific Elec. Bldg., Los Angeles, California; that she is over the age of eighteen years, and not a party to the above-entitled action;

That on Feb. 3, 1939 she deposited in the United States Mails in a mail depository at Union and "F" Streets, San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Answer addressed to Andrews, Blanche & Kline, Attorneys at Law, Union Oil Building, Los Angeles, California, at which place there is a delivery service by United States Mail from said post office.

FRANCES E. BARRAGER

Subscribed and Sworn to before me, this 3d day of February, 1939.

R. S. ZIMMERMAN,
Clerk, U. S. District Court,
Southern District of
California.

By FRANCIS E. CROSS,
(Court Seal) Deputy.

[Endorsed]: Filed Feb. 3, 1939. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk. [35]

[Title of District Court and Cause.]

FIRST AMENDED PETITION

(Action for Money had and Received—For
Recovery of Taxes Erroneously Collected)

Comes now plaintiff, The B. F. Goodrich Company, a corporation, and for its cause of action alleges:

I.

This action is brought against the United States of America as defendant for the reason that the person, namely, John P. Carter, who was Collector of Internal Revenue at Los Angeles, California, for the Sixth District of California, at the time of payment under protest of the amounts for the recovery of which this action is brought, died prior to the commencement of this action and on or about the 24th day of April, 1935.

II.

Plaintiff now is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of New York; that it is qualified to do business in the State of California, and has its principal office and place of business at Akron, Ohio, with an office in Los Angeles, California.

That defendant herein, the United States of America, now is and at all times mentioned herein was a body politic. [36]

III.

That on June 30, 1934, and at all times prior thereto and subsequent thereto, plaintiff was the sole shareholder of Pacific Goodrich Rubber Company and the sole owner of all of the issued and outstanding capital stock of Pacific Goodrich Rubber Company, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and that at no time prior to said date or thereon or at any time subsequent thereto were any of the shares of the capital stock of said Pacific Goodrich Rubber Company subscribed for but unissued.

That on said 30th day of June, 1934, plaintiff, as the sole shareholder of Pacific Goodrich Rubber Company and as the sole owner of all of the issued and outstanding shares of the capital stock of said Pacific Goodrich Rubber Company, became by operation of law, pursuant to a distribution in kind to it by Pacific Goodrich Rubber Company, the sole owner of and vested with the title to all the rights, claims and choses in action of every nature and description, which the Pacific Goodrich Rubber Company then had against all persons, firms or corporations, whether then due and payable or to become due or payable.

That as physical evidence, affirmative proof and in confirmation of the above and foregoing, an assignment was executed by Pacific Goodrich Rubber Company and delivered by it to plaintiff, all on or about June 30, 1934; that by the terms and pro-

visions of said assignment all of the assets above described, mentioned or referred to, were sold, transferred, assigned, and set over to plaintiff, all as is shown by said assignment, a full, true and correct copy of said assignment hereafter follows, is hereby referred to and made a part of this petition: [37]

“ASSIGNMENT

“Know All Men by these Presents that Pacific Goodrich Rubber Company, a corporation duly organized and existing under the laws of the State of Delaware and having its general offices at Los Angeles, California, for good and valuable considerations enuring to its benefit and herewith acknowledged, does hereby assign, transfer and set over to The B. F. Goodrich Company, a New York corporation, all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have against any and all persons, firms or corporations, whether now due and payable or hereafter becoming due and payable including, but without limiting the generality of the foregoing, all bills or accounts receivable, outstanding contracts, insurance policies, bank accounts, stocks, bonds, or other interest in other firms, companies and/or businesses, also all cash, trade marks, trade names, patents, leases, merchandise, raw materials, supplies and equipment.

“To have and to hold the same unto the said The B. F. Goodrich Company, its successors and assigns forever.

“Said Pacific Goodrich Rubber Company has nominated, constituted and appointed and by these presents does nominate, constitute and appoint said The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company to claim, demand payment and/or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof.

“And said Pacific Goodrich Rubber Company does hereby agree that it will at any time or from time to time hereafter at the request of said The B. F. Goodrich Company make, do and execute all such further acts and instruments as may be necessary, convenient and proper to enable The B. F. Goodrich Company to recover said claims and amounts hereinabove referred to, title to which is hereby vested or intended to be vested in said The B. F. Goodrich Company.

“In witness whereof, Pacific Goodrich Rubber Company has caused these presents to be signed in its name and on its behalf and its corporate seal to be affixed hereto by its President and

Secretary as of the 30th day of June, 1934.

PACIFIC GOODRICH RUBBER
COMPANY

By J. D. TEW
President"

"Attest:

S. M. JETT
Secretary"

In addition to the foregoing assignment and as a supplement thereof, there was executed by Pacific Goodrich Rubber Company, on the 14th day of August, 1935, a further document assigning unto The B. F. Goodrich Company all the rights, claims and choses in [38] action of every nature and description which the Pacific Goodrich Rubber Company then had against all persons, firms or corporations, whether then due and payable or should later accrue, all as shown by said document, a full, true and correct copy of which hereinafter follows, and is hereby referred to and made a part of this First Amended Petition:

"For value received, the undersigned, Pacific Goodrich Rubber Company, does hereby sell, assign and transfer unto The B. F. Goodrich Company, all claims, demands, choses in action or cause or causes of action of whatsoever kind and nature which it has or which may later accrue against all persons whomsoever, particularly its claim for refund of excise tax ille-

gally paid to the United States Government from and after April 17, 1934, in the sum of \$16,450.39, or any one sum finally found to be due, together with interest thereon.

“The assignor does by these presents, hereby nominate, constitute and appoint the said The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of the undersigned, to claim, demand payment and/or collect all such claims and amounts and particularly, such claim for excise tax illegally paid to the United States Government, and otherwise to prosecute any and all proceedings at law or in equity therefor and to take such other action as may be necessary or appropriate to settle, compromise and/or collect said claim or claims, and further, to give effectual discharge of said claim or claims.

“In witness whereof, the undersigned has hereunto attached its hand and seal this the 14th day of August, 1935.

(Seal) PACIFIC GOODRICH RUBBER
COMPANY

By J. D. TEW

President

By S. M. JETT

Secretary

F. C. LESLIE

F. M. SEIFERT

“State of Ohio,
County of Summit—ss.

“Before me, a Notary Public in and for said County, personally appeared J. D. Tew, President, and S. M. Jett, Secretary of the Pacific Goodrich Rubber Company, the corporation which executed the foregoing instrument, who acknowledged that the seal [39] affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as such President and Secretary in behalf of said corporation and by authority of its board of directors; and that said instrument is their free act and deed individually and as such President and Secretary and the free and corporate act and deed of said The Pacific Goodrich Rubber Company.

“In testimony whereof, I have hereunto subscribed my name and affixed my official seal at Akron, Ohio, this 14th day of August, 1935.

(Seal)

ALBERTA M. TEWERS

Notary Public

My Commission expires Dec. 15, 1935.”

IV.

That during his lifetime and during the time when the amounts herein paid were sought to be recovered, John P. Carter was the duly appointed, qualified and acting Collector of Internal Revenue for the Sixth District of California.

V.

That this is an action arising under the laws of the United States levying and providing for the collection of internal revenue, and more particularly under the Act of June 6, 1932, Chapter 209, Section 202, 47 Stat. 261, as modified by the Act of August 12, 1933, Chapter 25, Section 9 (a), 48 Stat. 35, and is for the recovery of a manufacturer's excise tax on rubber tires or casings erroneously and illegally collected from the plaintiff by the defendant.

VI.

That under Section 16 of the Agricultural Adjustment Act (Public No. 10, 73d Congress), plaintiff's predecessor in interest, Pacific Goodrich Rubber Company, was required to pay a tax upon the sale or other disposition of any article processed wholly or in chief value from cotton which it had on hand or in transit to it on August 1, 1933, (the date the processing tax on cotton went into effect by proclamation of the Secretary of Agriculture), [40] in an amount equivalent to the tax which would have been paid on said cotton had it actually been purchased after August 1, 1933, i.e., \$0.044184 per pound; that under Section 9(a) of said Agricultural Adjustment Act, plaintiff's said predecessor in interest was allowed to compute the manufacturer's excise tax on tires levied by Section 602 of the Revenue Act of 1932 by deducting from the weight of said tires the weight of processed cotton in said tires upon which a processing tax had been paid

under Section 9 (a) or Section 16 (a) of the Agricultural Adjustment Act.

VII.

That said defendant and said Collector of Internal Revenue refused to permit plaintiff's said predecessor in interest to take credit against excise tax on articles processed wholly or in chief value from cotton in its inventory on August 1, 1933, despite the fact that the processing tax had theretofore been duly paid by the plaintiff's said predecessor in interest upon cotton contained in such articles under Section 16 (a) of the Agricultural Adjustment Act, and said defendant and said Collector of Internal Revenue erroneously and illegally demanded payment by plaintiff's said predecessor in interest of \$..... with interest of \$....., and said defendant and said Collector of Internal Revenue erroneously collected from plaintiff's said predecessor in interest, and the same was turned over to defendant, the sum of \$15,880.64 on or about April 18, 1934, and \$569.75 on or about July 27, 1934.

VIII.

That plaintiff, on or about August, 1935, duly filed with Nat Rogan, successor of said deceased Collector of Internal Revenue, as Collector of Internal Revenue for the Sixth District of California, in Los Angeles, its Claim for Refund of said tax and interest in the aggregate sum of \$16,450.39, paid by plaintiff's [41] said predecessor in interest on April 17, 1934, and July 27, 1934, as set out

above, together with interest thereon from the date of such erroneous payment to the date of the allowance of refund, and that the grounds set forth in said Claim for Refund were as follows:

“Under the provisions of this section, (9 (a) of the Agricultural Adjustment Act), the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the Commissioner’s construction of Section 9 of the Agricultural Adjustment Act to the effect that the taxpayer is not entitled to the credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a proper construction of the Section 9 of the Agricultural Adjustment Act entitled taxpayer to a credit of the amount of tax and interest above claimed.”

That a full, true and correct copy of said Claim hereinafter follows, is hereby referred to and by this reference is incorporated herein and made a part of this First Amended Petition. [42]

Form 843

Treasury Department
Internal Revenue Service
Revised June, 1930

CLAIM

To be filed with the Collector where assessment was
made or tax paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on the
reverse side.

- [x] Refund of tax illegally collected.
- [] Refund of amount paid for stamps unused, or
used in error or excess.
- [] Abatement of tax assessed (not applicable to
estate or income taxes).

State of Ohio,
County of Summit—ss.

Name of taxpayer or purchaser of stamps The B. F.
Goodrich Company

Business Address 5400 E. Ninth Street, Los Angeles,
California

Residence

The deponent, being duly sworn according to law,
deposes and says that this statement is made on
behalf of the taxpayer named, and that the facts
given below are true and complete:

1. District in which return (if any) was filed Los
Angeles, California
2. Period (if for income tax, make separate form

for each taxable year) from, 19.....
to, 19.....

3. Character of assessment or tax excise tax
4. Amount of assessment, \$16,450.39; dates of payment April 17, July 27, 1934
5. Date stamps were purchased from the Government.....
6. Amount to be refunded—\$16,450.39 plus
7. Amount to be abated (not applicable to income or estate taxes) \$ interest
8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938

The deponent verily believes that this claim should be allowed for the following reasons:

Section 9 of the Agricultural Adjustment Act (H.R. 3835) provides: "That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of such finished article less the weight of the processed cotton contained therein, on which a processing tax has been paid." Under the provisions of this section, the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the Commissioner's construction of Section 9 of the Agricultural Adjustment Act to the effect that taxpayer is not entitled to a credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a

proper construction of the Section 9 of the Agricultural Adjustment Act entitled taxpayer to a credit of the amount of tax and interest above claimed.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company, a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company, to ask, demand or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof. [43]

(Signed) THE B. F. GOODRICH
COMPANY

By.....

Sworn to and subscribed before me this
day of, 193.....

.....
(Signature of officer administering oath)

.....
(Title)

(See Instructions on reverse side)

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

[Form not filled in]

I certify that the records of this office show the following facts as to the purchase of stamps:

[Form not filled in]

.....
Collector of Internal Revenue

.....
(District)

.....
Committee on Claims

Amount claimed.....\$.....

Amount allowed\$.....

Amount rejected\$.....

Instructions

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation. [44]

That said Claim was rejected by the Commissioner of Internal Revenue under date of May 22, 1936, along with an amended claim, filed as hereinafter stated.

IX.

That plaintiff, on or about April 10, 1936, duly filed with Nat Rogan, the successor to said deceased Collector of Internal Revenue, as Collector of Internal Revenue for the Sixth District of California, its amended Claim for Refund of said tax and interest, in the aggregate sum of \$16,450.39, paid by plaintiff's said predecessor in interest as

above set forth, and the grounds set forth in said Amended Claim were as follows:

“During the period from August 1, 1933 through September 30, 1933, the taxpayer manufactured and sold tires which contained some 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue for the Sixth District of California, a so-called floor tax levied by Section 16 of the Agricultural Adjustment Act, at the rate of .044184 per pound. That in computing the excise tax levied by Section 602 of the Revenue Act of 1932 upon tires manufactured and sold subsequent to August 1, 1933, taxpayer took a deduction from said excise tax in accordance with the provisions of Section 9 of the Agricultural Adjustment Act, that is, it arrived at excise tax due by deducting from the weight of the tires manufactured and sold after August 1, 1933, the weight of processed cotton in said tires upon which a so-called floor tax had been paid under Section 16 of the Agricultural Adjustment Act. Upon an examination of taxpayer's records, the Commissioner of Internal Revenue assessed the tax above described against the taxpayer upon the theory that the provisions of Section 9 of the Agricultural Adjustment Act did not [45] apply to articles upon which a floor stock tax had been paid under the provisions of Section 16 of the said Act. The taxpayer did not include

the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. Neither did it collect the amount of said tax from the persons to whom the articles in question were sold. That a proper interpretation of Section 9 of the Agricultural Adjustment Act entitled the taxpayer to the credit taken by it upon its excise tax returns by reason of the payment of the so-called floor tax. The taxpayer insists that the words 'processing tax' as used in Section 9 of the Agricultural Adjustment Act mean any and all taxes levied under and by the general scheme of the processing taxes and that 'processing taxes' as used throughout the Agricultural Adjustment Act mean not only the tax which accrued upon the processing of the article in question but the so-called floor tax levied in order to prevent processors from escaping or avoiding the taxes levied under said Agricultural Adjustment Act, and that Congress intended that the credit granted under said Section 9 of the Agricultural Adjustment Act should apply wherever any processing or floor stock tax had been paid."

That a full, true and correct copy of said Amended Claim hereinafter follows, is hereby referred to and is by reference incorporated herein and made a part hereof. [46]

Form 843

Treasury Department

Internal Revenue Service

Revised June, 1930

AMENDED CLAIM TO BE FILED WITH THE
COLLECTOR WHERE ASSESSMENT WAS
MADE OR TAX PAID.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

——Refund of Tax Illegally Collected.

——Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

——Abatement of Tax Assessed. (not applicable to estate or income taxes).

State of Ohio,

County of Summit—ss.

Name of taxpayer or purchaser of stamps—The B. F. Goodrich Company.

Business address—5400 E. Ninth Street, Los Angeles, Calif.

Residence—

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Los Angeles, California.

2. Period (if for income tax, make separate form

for each taxable year) from.....19....., to....., 19.....

3. Character of assessment or tax—Excise tax.
4. Amount of assessment, \$16,450.39; dates of payment—April 17, July 27, 1934.
5. Date stamps were purchased from the Government—
6. Amount to be refunded—\$16,450.39 plus interest.
7. Amount to be abated (not applicable to income or estate taxes)—\$
8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

During the period from August 1, 1933 through September 30, 1933, the taxpayer manufactured and sold tires which contained some 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue for the 6th District of California, a so-called floor tax levied by Section 16 of the Agricultural Adjustment Act, at the rate of .044184 per pound. That in computing the excise tax levied by Section 602 of the Revenue Act of 1932 upon tires manufactured and sold subsequent to August 1, 1933 taxpayer took a deduction from said excise tax in accordance with the provisions of Section 9 of the Agricultural Adjustment Act, that is, it arrived at excise tax due by deducting from the weight

of the tires manufactured and sold after August 1, 1933, the weight of processed cotton in said tires, upon which a so-called floor tax had been paid under Section 16 of the Agricultural Adjustment Act. Upon an examination of taxpayer's records, the Commissioner of Internal Revenue assessed the tax above described against the taxpayer upon the theory that the provisions of Section 9 of the Agricultural Adjustment Act did not apply to articles upon which a floor stock tax had been paid under the provisions of Section 16 of said Act. The taxpayer did not include the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. Neither did it collect the amount of said tax from the persons to whom the articles in question were sold. That a proper interpretation of Section 9 of the Agricultural Adjustment Act entitled the taxpayer to the credit taken by it upon its excise tax returns by reason of the payment of the so-called floor tax. The taxpayer insists that the words "processing tax" as used in Section 9 of the Agricultural Adjustment Act mean any and all taxes levied under and by the general scheme of the processing taxes and that "processing taxes" as used throughout the Agricultural Adjustment Act mean not only the tax which accrued upon the processing of the article in question but the so-called floor tax levied in order to prevent processors from escaping or avoiding the taxes levied under said Agricultural Adjustment Act, and that Congress intended that the credit

granted under said Section 9 of the Agricultural Adjustment Act should apply wherever any processing or floor stock tax had been paid.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company, a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company to ask, demand, or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof. [47]

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

[Form not filled in]

I certify that the records of this office show the

following facts as to the purchase of stamps:

[Form not filled in]

Collector of Internal Revenue

(District)

Amount claimed\$.....

Amount allowed\$.....

Amount rejected\$.....

Committee on Claims

Instructions

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administra-

tor, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation. [48]

X.

That on or about May 25, 1936, plaintiff received from the Commissioner of Internal Revenue a notice dated May 22, 1936, that the said Amended Claim for Refund of said additional assessment and interest was rejected by the Commissioner of Internal Revenue on May 22, 1936, and neither said amount collected from plaintiff's said predecessor in interest nor any part thereof has been repaid to plaintiff's said predecessor in interest or to plaintiff.

XI.

That on August 1, 1933, the plaintiff's said predecessor in interest held for sale or other disposition articles processed wholly or in chief value from cotton, to-wit, tire fabric, thread and other materials having a total cotton content of 782,474

pounds; that plaintiff's said predecessor in interest, according to law and the Regulations of the Secretary of the Treasury, promulgated in pursuance to said law, duly prepared and filed with said John P. Carter, Collector of Internal Revenue, its return and amended return showing said cotton content in detail, and paid to said Collector of Internal Revenue for defendant, and the same was paid and turned over to defendant by said Collector of Internal Revenue, a tax thereon at the rate of \$0.044184 per pound, which was the rate fixed by the Secretary of Agriculture in accordance with the provisions of the Agricultural Adjustment Act; that plaintiff's said predecessor in interest paid to said Collector of Internal Revenue for defendant and the same was paid and turned over to defendant under said return, the sum of \$34,648.08 in four installments as follows:

August 31, 1933.....	\$ 7,368.06
September 30, 1933.....	7,368.06
October 31, 1933.....	11,249.98
November 30, 1933.....	8,662.03

That despite the fact that the tax levied and collected was [49] erroneously and illegally levied and collected, no part of the above named tax has been received by, refunded or credited to the plaintiff or to plaintiff's said predecessor in interest.

XII.

That from August 1st through the 15th day of

September, 1933, plaintiff's said predecessor in interest manufactured and sold tires which contained 705,806 pounds of the above mentioned 782,474 pounds of articles processed wholly or in part from cotton and which was in the inventory of plaintiff's said predecessor in interest, and, on August 1, 1933, being held for sale or other disposition by said plaintiff's predecessor in interest and upon which a tax at the rate of \$0.044184 per pound had been paid as above set forth.

XIII.

That for the months of August, September, October, November and December, 1933, plaintiff's said predecessor in interest filed with said John P. Carter, Collector of Internal Revenue, its manufacturers' excise tax returns in accordance with the law and regulations of the Secretary of the Treasury, and paid to said Collector of Internal Revenue for and the same was paid and turned over to defendant, the taxes disclosed by said returns to be due and owing on the tires sold during said months, under the provisions of Section 602 of the Revenue Act of 1932; that said plaintiff's predecessor in interest computed the aforesaid taxes by deducting from the weight of the tires so sold the weight of the articles processed wholly or in chief value from cotton, contained therein, including in said deduction the above described 757,260 pounds of articles processed wholly or in chief value from cotton

upon which a tax had theretofore been paid at the rate of \$0.044184 per pound as hereinbefore alleged. That on or about April 10, 1934, the defendant and the said Collector of Internal Revenue for defendant assessed an additional manu- [50] facturer's excise tax against plaintiff's said predecessor in interest for the months of November and December, 1933, and in the sum of \$15,880.64, with interest in the sum of \$569.75, and that said additional assessment erroneously and illegally included an additional excise tax at the rate of $2\frac{1}{4}\text{¢}$ per pound upon said 705,806 pounds of articles processed wholly or in chief value from cotton, which amount plaintiff's said predecessor in interest had deducted from the weight of tires sold by it during the months of August and September, 1933, as above alleged.

XIV.

Upon demand by defendant and said John P. Carter, Collector of Internal Revenue, plaintiff's said predecessor in interest on April 17, 1934, paid to said Collector of Internal Revenue for, and the same was paid and turned over to defendant, the sum of \$15,880.64, and on July 27, 1934, paid to said Collector of Internal Revenue for, and the same was paid and turned over to defendant, interest according to the said demand in the sum of \$569.75; that said payments were made by plaintiff's said predecessor in interest under protest that such assessment was erroneous and illegal and was

made solely to avoid interest and penalty, of which fact the defendant was duly advised at the time of said payments.

XV.

That at the time said additional tax was assessed, the defendant and the said John P. Carter, Collector of Internal Revenue, for convenience in arriving at the additional tax and interest which defendant and said Collector of Internal Revenue claimed to be due from plaintiff's said predecessor in interest to defendant, determined that such assessment should be levied for the months of November and December; that plaintiff's said predecessor in interest did not object to this action if assessment were to be made, but did object to any additional assessment being made. [51]

XVI.

That plaintiff's said predecessor in interest did not and has not included any of the tax which plaintiff herein seeks to recover in the price of the article with respect to which the said tax was imposed nor did plaintiff's said predecessor in interest collect the amount of the said tax or any thereof from the vendees of said article.

XVII.

That by reason of the premises, defendant became and is indebted to plaintiff in the sum of \$16,450.39, together with interest, after allowing all just credits and offsets.

XVIII.

That plaintiff is and always has been the sole owner of the claims herein referred to since June 30, 1934, and has not assigned, transferred or otherwise disposed of said claims or any thereof or any part thereof or any interest therein.

Wherefore, the plaintiff prays judgment against the defendant, United States of America, in the sum of \$16,450.39, with interest thereon at the rate of six per cent (6%) per annum, upon the sum of \$15,880.64 from April 18, 1934, and interest at said rate upon the sum of \$569.75 from July 27, 1934.

THE B. F. GOODRICH COMPANY

By EUGENE H. BLANCHE

Its Attorney [52]

State of California,
County of Los Angeles—ss.

J. C. Herbert, being by me first duly sworn, deposes and says: That he is Assistant Secretary of The B. F. Goodrich Company, the petitioner in the above entitled action; that he makes this affidavit for and on behalf of said The B. F. Goodrich Company; that he has read the foregoing First Amended Petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

J. C. HERBERT

Subscribed and sworn to before me this 2nd day of February, 1940.

(Seal)

ETHEL HICKEY

Notary Public in and for said County of
Los Angeles, State of California

[Endorsed]: Filed Feb. 5, 1940. R. S. Zimmerman, Clerk. By C. E. Hollister, Deputy. [53]

[Title of District Court and Cause.]

STIPULATION

(1—As to filing First Amended Petition by Plaintiff; 2—That Answer of Defendant to Petition as amended be Answer to First Amended Petition)

It is hereby stipulated by and between the above named plaintiff, The B. F. Goodrich Company, and the above named defendant, United States of America, by and through their respective counsel, as follows:

(a) That the petition and the amendment to the petition on file in the above entitled action may be amended in the particulars as set forth in plaintiff's First Amended Petition presented herewith:

(b) That defendant's Answer heretofore filed herein to plaintiff's Petition as amended shall in all particulars be deemed to be and shall be an Answer to plaintiff's First Amended Petition in all particulars and with the same force and effect and

to the same extent as though said Answer was specific and particular answer to said First Amended Petition.

Dated: February 2, 1940.

EUGENE H. BLANCHE

Attorney for Plaintiff

BEN HARRISON,

United States Attorney

By ARMOND MONROE JEWELL

Assistant United States Attorney

Attorneys for Defendant

It is so ordered, this Feb. 5, 1940.

PAUL J. McCORMICK

Judge

[Endorsed]: Filed Feb. 5, 1940. R. S. Zimmerman, Clerk. By C. E. Hollister, Deputy Clerk. [54]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

The undersigned does hereby substitute Eugene H. Blanche in the place and stead of the firm of Andrews, Blanche & Kline as its attorney in the above entitled matter.

Dated this 20th day of October, 1939.

THE B. F. GOODRICH COMPANY

By J. C. HERBERT

Ass't Sec'y

We hereby consent to the foregoing substitution this 2...th day of October, 1939.

ANDREWS, BLANCHE & KLINE

By L. W. ANDREWS

I hereby accept the foregoing substitution this 26th day of October, 1939.

EUGENE H. BLANCHE

[Endorsed]: Filed Feb. 10, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy. [55]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The tax sought to be recovered in the above entitled action was paid to John P. Carter, the Collector of Internal Revenue, at Los Angeles, California, for the Sixth District of California. The said John P. Carter died prior the commencement of this action, namely, on or about the 24th day of April, 1935. Nat Rogan succeeded the said John P. Carter, deceased, as Collector of Internal Revenue,

for the Sixth District of California, and still holds that position.

2. The plaintiff herein is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of New York with its principal place of business at Akron, Ohio; that it is qualified to do business in the State of California and has an office at Los Angeles, California.

The defendant, United States of America now is and at all times mentioned in the First Amended Petition herein and in this stipulation was a body politic. [56]

3. That if J. C. Herbert was called as a witness and sworn in the hearing and trial of the above entitled matter, he would testify as follows:

That on June 20, 1927, Pacific Goodrich Rubber Company was incorporated under the laws of the State of Delaware.

That said corporation was dissolved on or about December 21, 1934.

That from on or about March 1, 1928 to on or about June 30, 1934, he, the said J. C. Herbert was an officer of, to wit, Secretary of said Pacific Goodrich Rubber Company, and that from on or about June 30, 1934, to December 21, 1934, he was Vice President of said corporation; that as such he had charge of the corporate books and records of said corporation.

That on June 30, 1934, 8000 shares of the capital stock of said Pacific Goodrich Rubber Company were issued and outstanding, and that none of the shares of said stock were subscribed for but unissued; that at all times on and after June 30, 1934, the number of shares of stock of said Pacific Goodrich Rubber Company which were issued and outstanding remained unchanged; that at no time on or after June, 1934, were any of said shares subscribed for but unissued; that the books, records and accounts of Pacific Goodrich Rubber Company disclosed at all times from the time of the first issuance of stock up to and including the date of its disincorporation that all stock issued by Pacific Goodrich Rubber Company was issued in the name of The B. F. Goodrich Company, a corporation, or to Trustees for its benefit as the actual owner thereof.

That he, the said J. C. Herbert, was on June 30, 1934, and ever since said date has been and now is an officer of The B. F. Goodrich Company, a corporation, to wit, the Ass't Secretary of said corporation, and as such is familiar with the assets and affairs of such Company, and that on June 30, [57] 1934, and at all times thereafter up to and including December 21, 1934, The B. F. Goodrich Company was the owner of 8,000 shares of capital stock of Pacific Goodrich Rubber Company.

That he, the said J. C. Herbert, as said officer of Pacific Goodrich Rubber Company, and as officer of The B. F. Goodrich Company, knows that the original assignment dated June 30, 1934, copy of which is particularly set forth in lines 1 to 28, inclusive, of page 3 of the First Amended Petition in the above entitled matter, was executed by Pacific Goodrich Rubber Company to and in favor of The B. F. Goodrich Company and was by said Pacific Goodrich Rubber Company delivered to the said The B. F. Goodrich Company, and that the original of the assignment, dated August 14, 1935, copy of which is set forth in lines 7 to 32 of page 4, and lines 1 to 10 of page 5, of the First Amended Petition in the above entitled action was executed by Pacific Goodrich Rubber Company to and in favor of The B. F. Goodrich Company and was delivered by Pacific Goodrich Rubber Company to the said The B. F. Goodrich Company.

That full, true and correct copies of said assignments of June 30, 1934 and of August 14, 1935 are filed herein as plaintiff's Exhibits "A" and "B" respectively; said copies having by stipulation the same force and effect as though the original assignments were so filed.

4. That if George Hubbell were called as a witness and sworn at the hearing and trial of the above entitled matter, he would testify as follows:

That he now is and at all of the times mentioned in the First Amended Petition herein was an agent and employee of Pacific Goodrich Rubber Company, to-wit, [58] the cashier and/or auditor of said Company, and that he is and at all times mentioned in said First Amended Petition, since June 30, 1934, was an officer of, to-wit, an Assistant Treasurer of The B. F. Goodrich Company.

That the books and records of said Pacific Goodrich Rubber Company show the quantity and quality of articles that Pacific Goodrich Rubber Company held for sale on August 1, 1933, which were processed wholly or in chief from cotton, to-wit, tire fabric, thread, and other materials, and the quantity and type of tires which were manufactured by Pacific Goodrich Rubber Company from said articles from August 1, 1933 to the 5th day of January, 1934, and the cotton content of the tires and the quantity of the processed cotton contained therein and the amount of cotton which was used in the manufacture of said tires which comprised articles processed from cotton on August 1, 1933, and which were held by Pacific Goodrich Rubber Company for sale or other disposition on said date and other items and matters relating to taxes paid by Pacific Goodrich Rubber Company and its dealings under all Revenue Acts and under the Agricultural Adjustment Act of the United States of

America,—which books and records were and are kept under the supervision and control of the said George Hubbell, his duties being, among others, to keep said books and records; that he, the said George Hubbell is familiar with and knows the prices at which tires were sold by Pacific Goodrich Rubber Company at all the times mentioned in said First Amended Petition herein and is familiar with and knows whether or not there was included in the price of the tires sold by Pacific Goodrich Rubber Company during the period from August 1, 1933 to the 5th day of January, 1934, any amount to cover any [59] excise tax on the processed cotton contained in the tires manufactured and sold by Pacific Goodrich Rubber Company during said period, and is familiar and knows whether the prices at which Pacific Goodrich Rubber Company sold tires during said period containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act were any greater than the prices at which during said period Pacific Goodrich Rubber Company sold tires containing processed cotton on which a tax was payable under Section 9-a of the Agricultural Adjustment Act, and knows whether any additional billing was made to customers and/or vendees who purchased said tires during said period after the assessment of \$15,880.64 was made against said Pacific Goodrich Rubber

Company as alleged in said First Amended Petition herein.

That on August 1, 1933, Pacific Goodrich Rubber Company held for sale or other distribution articles processed wholly or in chief value from cotton, to-wit, tire fabrics, threads, and other materials having a total cotton content of 782,474 pounds, hereinafter referred to as processed cotton: that pursuant to Section 16 of the Act of May 12, 1933, hereinafter referred to as the Agricultural Adjustment Act and the regulations of the Secretary of the Treasury established thereunder, duly prepared and filed with John P. Carter, deceased, then Collector of Internal Revenue for the Sixth District of California, its return showing the said processed cotton of 784,177 pounds, and paid to him a tax thereon at the rate of \$0.044184 per pound as duly fixed by the Secretary of Agriculture, in the total sum of \$34,648.08. Said tax was paid in four [60] installments as follows:

August 31, 1933.....	\$ 7,368.06
September 30, 1933.....	7,368.06
October 31, 1933.....	11,249.98
November 30, 1933.....	8,666.03

5. It is hereby stipulated that no portion of said tax of \$34,648.08 has been refunded to Pacific Goodrich Rubber Company or to this plaintiff.

6. That the said George Hubbell, if so called as aforesaid, would testify as follows:

During the period from August 1, 1933, through the 5th day of January, 1934, Pacific Goodrich Rubber Company manufactured and sold tires (exclusive of tax-free tires sold to the Government for export) which contained 705,806 pounds of the 782,474 pounds of processed cotton which were in Pacific Goodrich Rubber Company's inventories on August 1, 1933, being held for sale or other disposition by said Pacific Goodrich Rubber Company; that the other and remaining 76,668 pounds of processed cotton which Pacific Goodrich Rubber Company held for sale or other disposition on August 1, 1933, were manufactured and sold in rubber products other than tires, or wasted.

That pursuant to Section 602 of the Act of June 6, 1932, hereinafter referred to as the Manufacturer's Excise Tax, Pacific Goodrich Rubber Company prepared and filed excise tax returns with respect to the tires which it sold during the period from August 1, 1933, through the 5th day of January, 1934; that in preparing said returns, Pacific Goodrich Rubber Company computed the weight of the tires subject to the manufacturer's excise tax but deducted from the aforesaid gross weight 782,474 pounds, being the weight of the processed cotton contained therein and on which a tax had been paid under Section 9-a or Section 16 of the Agricultural Adjustment Act, namely 782,474 pounds of [61] of processed cotton; that Pacific Goodrich Rubber Company reported in its manufacturer's excise tax returns for the period from August 1,

1933, through the 5th day of January, 1934, the remaining pounds in the tires sold during said periods and paid to the said John P. Carter, deceased, an excise tax of $2\frac{1}{4}$ cents per pound on such weight.

6(a) It is hereby stipulated that on or about the 10th day of April, 1934, the defendant assessed against Pacific Goodrich Rubber Company an additional manufacturer's excise tax in the sum of \$15,880.64 together with interest of \$569.74, and demanded that said additional tax be paid by Pacific Goodrich Rubber Company; that said assessment and demand was made upon Treasury Department Form 728, Revised November 1933; a full, true and correct copy of which is filed herein as plaintiff's Exhibit "C" and has the same force and effect as though the original thereof was so filed.

That said additional assessment included a tax of $2\frac{1}{4}$ cents per pound upon 705,806 pounds of processed cotton which Pacific Goodrich Rubber Company had deducted from the weight of the tires sold by it during the period from August 1, 1933, to the 5th day of January, 1934.

7. That said George Hubbell would further testify that the 705,806 pounds of processed cotton so assessed by the said John P. Carter, deceased, and/or the defendant, were a part of the 784,177 pounds of articles processed wholly or in chief value from cotton which Pacific Goodrich Rubber Company held for sale or other disposition on August 1, 1933, and upon which it had paid a tax of \$34,-

648.08 under Section 16 of the Agricultural Adjustment Act.

8. It is further stipulated and agreed that on or about April, 1934, Pacific Goodrich Rubber Company paid to the said John P. Carter, deceased, \$15,880.64 of said additional assessment [62] and on or about July 27, 1934, paid the balance of said assessment, namely, \$569.75, representing interest on the above described \$15,880.64. That said payments were made by Pacific Goodrich Rubber Company under protest and the said John P. Carter, deceased, and the defendant were fully so advised at the time of said payments.

That the said George Hubbell, if so called as above set forth, would testify that said payments were made by Pacific Goodrich Rubber Company solely to avoid penalties and said Pacific Goodrich Rubber Company so advised the said John P. Carter, deceased, and the said defendant.

9. It is further stipulated and agreed that on or about August 31, 1935, the plaintiff herein duly filed with Nat Rogan, successor to John P. Carter, deceased, as Collector of Internal Revenue for the Sixth District of California, a claim dated August 14, 1935, for refund of said tax of \$15,880.64, plus interest amounting to \$569.75 which had been assessed and collected by the defendant from Pacific Goodrich Rubber Company, a full, true and correct copy of said claim is filed herein as plaintiff's Exhibit "D" and has the same force and effect as though the original thereof was so filed.

10. It is further stipulated and agreed that on or about April 21, 1936, plaintiff duly filed with said Nat Rogan, successor of John P. Carter, deceased, as such Collector of Internal Revenue, its amended claim for refund of said tax of \$15,880.64, plus interest of \$569.75, all of which had been assessed and collected by the defendant from Pacific Goodrich Rubber Company, a full, true and correct copy of said claim is filed herein as plaintiff's Exhibit "E" and has the same force and effect as though the original thereof was so filed. [63]

11. It is further stipulated and agreed that the Commissioner of Internal Revenue denied and disallowed both the original and amended claims for refund by written notice to the plaintiff as successor to Pacific Goodrich Rubber Company, a copy of said denial and disallowance bearing date of May 22, 1936, is filed herein as plaintiff's Exhibit "F" and has the same force and effect as though the original thereof was so filed.

12. That the said George Hubbell, if so called as aforesaid, would testify that throughout the period from August 1, 1933 to about the 10 day of April, 1934, Pacific Goodrich Rubber Company was informed and believed that for the purpose of computing its Manufacturer's Excise Tax on tires manufactured and sold, it was entitled, under the provisions of Section 9-a of the Agricultural Adjustment Act to deduct from the weight of the tires so sold the weight of the processed cotton contained therein upon which a tax had been paid either

under Section 9-a or Section 16 of the Agricultural Adjustment Act, and that Pacific Goodrich Rubber Company and plaintiff herein at all times prior to the 10 day of April, 1934, believed that its tax burden with respect to said tires would amount to \$0.044184 on the processed cotton contained in said tires and $2\frac{1}{4}$ cents per pound on the remaining weight of said tires; and that at no time during the period preceding the 10 day of April, 1934, did Pacific Goodrich Rubber Company or plaintiff herein contemplate that Pacific Goodrich Rubber Company or plaintiff would be compelled to pay an additional tax of $2\frac{1}{4}$ cents per pound on account of processed cotton contained in said tires, and on which it had paid a tax of approximately $4\frac{1}{2}$ cents per pound under Section 16 of the Agricultural Adjustment Act; and that Pacific Goodrich Rubber Company did not include nor did it intend to include in the price of tires sold during the period from August 1, 1933 to the 5th day of January, 1934, any amount [64] to cover any excise tax on the processed cotton contained in the tires manufactured and sold during said period; and that the prices at which Pacific Goodrich Rubber Company sold said tires during said period, containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act, were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was payable under Section 9-a of the Agricultural Adjustment Act, and that no

additional tax was proposed against Pacific Goodrich Rubber Company until long after all tires containing cotton held for sale or other disposition on August 1, 1933, had been sold and billed to purchasers of or vendees of Pacific Goodrich Rubber Company, and that no additional billing was made to said customers and/or said vendees and no additional amount collected from said customers and/or said vendees after the assessment of the above mentioned \$15,880.64.

13. It is further stipulated and agreed that each and all of the above and foregoing stipulations with respect to which the said J. C. Herbert and/or the said George Hubbell would testify if so called as witnesses in the above matter, shall be taken with the same force and same effect and to the same extent as though the said J. C. Herbert and/or the said George Hubbell had been so sworn and so testified, all as hereinabove set forth.

Dated: February 10, 1940.

F. C. LESLIE

EUGENE H. BLANCHE

Attorneys for Plaintiff

BEN HARRISON,

United States Attorney,

By ARMOND MONROE JEWELL,

Assistant United States Attorney

Attorney for Defendant

[Endorsed]: Filed Feb. 10, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy. [65]

At a stated term, to-wit: The February Term, A. D. 1940, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Saturday the 10th day of February in the year of our Lord one thousand nine hundred and forty.

Present: The Honorable Paul J. McCormick, District Judge.

[Title of Cause.]

This cause coming on for trial; Eugene H. Blanche, Esq., appearing as counsel for the plaintiff; A. M. Jewell, Assistant U. S. Attorney, appearing as counsel for the Government; A. Wahlberg, Court Reporter, being present; and F. C. Leslie, Esq., is now associated as counsel for the plaintiff herein for the purposes of this case; at 10:07 o'clock A. M. both sides answering ready, it is ordered to proceed.

Attorney Blanche makes a statement of the plaintiff's case; Attorney Leslie makes a further statement of the plaintiff's case; Attorney Jewell makes a statement of the Government's case. Attorney Blanche now presents Stipulation of Facts, which is ordered filed herein. The following exhibits are offered and admitted in evidence:

Plf's Ex. A—Copy of Assignment, dated
6 30 34,

Plf's Ex. B—Copy of Assignment, dated 8/14/35,

Plf's Ex. C—Copy of Return for Nov. & Dec. 1933,

Plf's Ex. D—Copy of Claim for Refund, dated 8/19/35,

Plf's Ex. E—Copy of Amended Claim Refund, dated 3/30/36

Plf's Ex. F—Copy of Claim for Refund, dated 8/19/35,

Plf's Ex. G—Copy of Amended Claim for Refund, Form 843,

Plf's Ex. Hl, Ha, and Hs—Three (3) Letters, Treas. Dep't to Goodrich Co.,

Plf's Ex. I—Copy of Minutes of 7/6/34 and 8/24/34,

Plf's Ex. J—Copy of Certificate of Dissolution, dated 12/21/34.

At 10:30 o'clock A. M. the plaintiff rests.

Attorney Jewell now offers the following exhibits, and the same are received in evidence:

U. S. Ex. 1—Copy of Return, dated Nov. 1933,

U. S. Ex. 2—Copy of Return, dated Dec. 1933, [66]

U. S. Ex. 3—Copy of Claim for Abatement, dated 7/7/36,

U. S. Ex. 4—Copy of Claim for Abatement, dated 5/27/36.

At 10:30 o'clock A. M. the Government rests.

Attorney Blanche makes a further statement and moves to amend Petition herein as to certain typographical errors being corrected and there being no objections thereto, it is so ordered, the Clerk now correcting same by interlineation on the original Petition herein.

The plaintiff and the Government rest.

It is ordered that the cause be submitted for decision on briefs to be filed 20 x 20 x 10 commencing February 12, 1940. [67]

[Title of District Court and Cause.]

CONCLUSIONS OF THE COURT ON THE
MERITS OF THE ACTION.

This is an action by the plaintiff corporation, as sole owner of the stock of, and as assignee of Pacific Goodrich Rubber Company, a corporation, to recover the sum of \$16,450.39, with interest. The demand is based upon claims for refund of taxes paid by Pacific Goodrich Rubber Company under protest, and alleged by the plaintiff to have been erroneously computed and assessed by the Commissioner of Internal Revenue under Section 602 of the Revenue Act of 1932.

The record shows the following factual situation:

During the period from August 1, 1933, through September 30, 1933, the taxpayer, Pacific Goodrich Rubber Company, manufactured and sold tires which contained approximately 705,806 pounds of

cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue, a so-called "floor tax" levied by Section 16 of the Agricultural Adjustment Act, 48 Stat. 31, at the rate of .044184 per pound. In computing the excise taxes imposed by Section 602 of the Revenue Act of 1932 upon tires manufactured and sold after August 1, 1933, taxpayer took a deduction from such excise tax as provided in Section 9 of the Agricultural Adjustment [68] Act, *supra*; in other words, the taxpayer arrived at the excise tax due under the 1932 Act by deducting from the weight of the tires manufactured and sold after August 1, 1933, the weight of the processed cotton in such tires, upon which a so-called "floor tax" had been paid under Section 16, *supra*. This claimed credit or deduction was disallowed by the Bureau of Internal Revenue, and the tax authorities of the United States thereupon demanded additional manufacturer's tax under Revenue Act of 1932, and the taxpayer, Pacific Goodrich Rubber Company, in order to avoid penalties and interest, paid under protest the additional manufacturer's tax and interest in the sum of \$16,450.39. This action followed claims, both by the taxpayer and by the plaintiff, for the refund of said sum of money, with interest, which have been rejected by the Government.

The position of the United States is substantially that, despite the fact that the taxpayer had paid the tax on the cotton in the tires under provisions of the

Agricultural Adjustment Act, it was not entitled to refund of the \$16,450.39.

The aforesaid section of the Revenue Act of 1932 imposed a tax upon tires, wholly or in part of rubber, of $2\frac{1}{4}\text{¢}$ a pound on total weight of sales by manufacturers.

Section 9(b), *supra*, provided that "upon any article upon which a manufacturer's sales tax is levied under the authority of the Revenue Act of 1932, and which manufacturer's sales tax is computed on the basis of weight, such manufacturer's sales tax shall be computed on the basis of weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid." [69]

Section 16, *supra*, titled "floor stocks" imposes a tax equal in amount to the processing tax imposed by other parts of Title I of the Agricultural Adjustment Act.

The primary question for decision under the stipulation of facts filed herein, and the further record evidence received at the hearing in court on February 10, 1940, is whether plaintiff's predecessor and assignor, a tire manufacturer, was entitled in the computation of its sales tax on tires under the Revenue Act of 1932 to deduct from the weight of the taxed tires the weight of the taxed cotton therein upon which it had paid the tax specified in Section 16 of Title I of the Agricultural Adjustment Act.

Secondly, if under the facts of this case, such deduction or credit is proper and allowable to the tax-

payer company under the Revenue Act of 1932, is the plaintiff in this action, who was not actually the taxpayer, entitled under the record to require a refund to it of such overpayment?

Plaintiff contends that the tax credit or refund sued for in this action is neither a "floor stock tax" nor a "processing tax," but, rather, an "additional manufacturer's excise tax;" but assuming that such is the case, and on demurrer we substantially held that it was, yet, in order for the plaintiff to recover in this action it must show that Section 9 of the Triple A Act authorizes the credit demanded.

If the section is read and considered literally, its provisions are restricted to paid "processing taxes" as such are expressly defined in the Agricultural Adjustment Act. It is undeniable that the so-called "floor stock" tax provided for in the Agricultural Adjustment Act is not within the literal terms of Section 9. Indeed, the tax [70] levied under Section 16 is not defined in the Act; but the established rule that where the words of a statute are clear there is no room for construction, is not to be applied where the literal meaning produces an unreasonable result—one that is "plainly at variance with the policy of the legislation as a whole." *United States v. American Trucking Assn.*, 310 U. S. 534.

In my opinion, an examination of Title I of the Agricultural Adjustment Act with the aid and in the light of the correlative legislative history and material which led up to this remedial law, clearly

shows the error and injustice of the contention that the deduction computation provided in Section 9 is inapplicable to the unnamed tax imposed by Section 16, or that deductions under Section 9 should be confined to specifically defined "processing" taxes according to the letter of the law. To so restrict the application of Section 9a would utterly destroy the chief factor present in the legislative mind in making omnibus provisions to prevent tax discrimination between tire manufacturers without any real differentiation of business activity in or use of fabricated commodities. See *United States v. Dickerson*, 310 U. S. 554.

The intent and purpose of Congress must be ascertained as of the time of enacting the Agricultural Adjustment Act and not by looking backward and taking into consideration the untoward consequences that ensued from the decision of the Supreme Court in *United States v. Butler*, 297 U. S. 1.

To construe the refund or credit provisions of the Triple A so as to include the so-called "floor stock" taxes as well as the statutorily defined "processing" taxes instead of adding "something entirely new to the meaning [71] of the word 'processing', as it is used" in the statutes, as argued by the Government, merely sheds light upon what appears from reading the whole of Title I to have been the painstaking purpose of Congress—namely, the prevention of discrimination and double taxation.

We have been unable to find from an analysis of the applicable tax statutes any reason why the Con-

gress should desire to relieve the manufacturers of the burden of double taxation where one tax is a processing tax and the other is a sales tax and not to relieve the same manufacturers of double taxation when one of the taxes is a so-called "floor stock tax" and the other is a sales tax; therefore, the danger of going beyond the literal interpretation of a taxing statute, adverted to in *United States v. American Trucking Assn.*, *supra*, is not present in the consideration of the tax legislation pertinent to this action.

The Government substantially contends that the decision of the United States Supreme Court in *United States v. Butler*, *supra*, declaring certain portions of the Agricultural Adjustment Act to have been unconstitutional, operates to nullify all refund rights of taxpayers which arise by virtue of any feature of the taxing scheme invalidated. We are not impressed with this claim—it fails to evaluate the effect of Section 14 of Title I of the Act, which is as follows:

"If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance or commodity is held invalid, the validity of the remainder of this title and the applicability thereof to other persons, circumstances or commodities shall not be affected thereby."

Moreover, while the claim which is the basis of this action [72] has relation to the levy of the so-called

“floor stock” taxes provided for in Title I of the Triple A, the refund which is here sought is for an erroneously paid “manufacturer’s excise tax” assessed and collected under the aforesaid effective section of the Revenue Act of 1932.

We also incline very strongly to the conclusion that, apart from the right of the taxpayer to a refund of the wrongfully demanded and collected excess taxes under the applicable revenue laws, the record before us entitles the taxpayer to the refund under the equitable remedy of money had and received. See *Bull, Executor, v. United States*, 295 U. S. 247; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, at page 350.

In view of our conclusion that the refund sued for in this action is for an unjustly collected manufacturer’s excise tax, the administrative procedure under Section 902, et seq. of the Revenue Act of 1936 is unnecessary and inapplicable. In this connection the attitude and action of the governmental tax agencies throughout, as shown by the record before us, indicates that the claim in suit was considered by them as pertaining to an “additional manufacturer’s tax,” and we think that the United States should now in good conscience be prevented from taking a contrary stand to the prejudice of a wronged taxpayer.

The ultimate question is whether or not the plaintiff company is entitled under the record before us to the tax refund demanded in this action.

The observation of Justice Holmes, in *Rock Island, etc., Railroad Co. v. United States*, 254 U. S. 141, that "Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions must be [73] complied with," are strikingly applicable to the right of the plaintiff corporation to require in this action payment to it of money in the United States Treasury which has been wrongfully exacted from another company as taxes.

The plaintiff by its "First Amended Petition" alleges its right to recover the erroneously computed and collected manufacturer's excise tax by reason of its sole ownership of the capital stock and assets of the taxpayer, and also because of two assignments to it dated June 30, 1934, and August 14, 1935, respectively, of all claims, rights and choses in action which the taxpayer then had or might have against all persons, firms or corporations, and particularly the tax refund claim against the United States. The only substantial difference between the two assignments appears to be that the latter was acknowledged before a notary public while the former is not so acknowledged.

It is to be noted that there is a variance between this enlarged claim in the amended petition and the claims for refund which were filed by the taxpayer and by plaintiff company with the Commissioner of Internal Revenue and rejected by him. In the latter under Form 843 the claims are based solely upon

the assignments and there is no mention therein of the stock ownership of the corporation taxpayer.

The Supreme Court has held that literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the Collector or the United States. *Tucker v. Alexander, Collector*, 275 U. S. 228.

The variance to which we have adverted is not occasioned by failure to comply with statutory requirements but rather to the requirement of the Treasury regulations [74] which state that claims for refund must set forth in detail each ground upon which they are made, and facts sufficient to apprise the Commissioner of the exact basis thereof. Such a requirement may be waived. *Tucker v. Alexander*, *supra*; *University Distributing Co. v. United States*, 22 Fed. Supp. 794; *Con-Rod Exchange, Inc. v. Henriksen, etc.*, 27 Fed. Supp. 427. The Commissioner, as shown by Exhibit "H" in evidence, appears to have rejected all claims for refund upon the broad ground that no right to refund existed in the taxpayer or the plaintiff under the Commissioner's interpretation of Section 9a of the Agricultural Adjustment Act, and the failure of the United States to insist at any time upon the literal compliance with the regulations is tantamount to a waiver in that regard.

It is settled law that except as to assignments by operation of law all transfers and assignments made

upon any claims upon the United States shall be absolutely null and void unless executed with certain specified formalities after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Section 203, Title 31, U. S. C. A. *Seaboard Air Line Railway v. United States*, 256 U. S. 655; *Kingan & Co. v. United States*, 44 F. (2d) 447.

The position taken by the plaintiff throughout the prosecution of the claim to tax refund demanded by this action has been until the filing of First Amended Petition herein on February 5, 1940, that its cause of action and right to recover is based upon the two assignments—only at such late day did the plaintiff assert its right to the refund as sole stockholder of Pacific Goodrich Rubber Company—or by reason of the taxpayer corporation having [75] dissolved December 21, 1934. There does appear in the record before us an authenticated claim of the plaintiff as successor to the taxpayer company, filed with the Collector July 8, 1936, and marked in evidence as Exhibit “3”, for abatement of certain taxes, in which plaintiff makes the statement that it is the taxpayer by reason of the assignment of June 30, 1934, and the dissolution of the taxpaying corporation on December 21, 1934. This exhibit, we think, does not materially alter the position which has been taken by the plaintiff until the exigency of avoiding the consequence of the statute relating to assigned claims against the United States

became imminent. But the chose in action did not lodge in plaintiff by its ownership of all the corporate stock of the Pacific Goodrich Rubber Company, or by the dissolution of that corporation on December 21, 1934. It vested by reason of the assignments which were executed voluntarily by the two corporations for expressed valuable considerations. The status of the plaintiff as a claimant against the United States is clearly within the inhibition of Section 203, Title 31, U. S. C. A.

The claim in suit has not been allowed, its amount has not been ascertained, and no warrant for its payment has been issued.

Section 621d of the Revenue Act of 1932, 26 U. S. C. A., Title 3443, provides as follows:

“(d) No overpayment of tax under this chapter shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, [76] or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.”

This is a statutory requirement which is the yardstick or measuring rod by which we are to determine a litigant's right to sue the United States for refund or credit of an overpayment of a tire manufacturer's excise tax imposed by Section 602 of the Revenue Act of 1932, 26 U. S. C. A., Section 3400, and is the statute invoked by the plaintiff in the case at bar, and in order to maintain the action The B. F. Goodrich Company, a corporation, must bring itself within the literal and strict requirements of this statute. This, we think, it has not done. The plaintiff is not the "person who paid the tax." It is a corporate entity distinct from the corporate taxpayer. The latter, during the manufacturing period upon which the credit or right to refund is claimed, conducted business and commercial operations in its own corporate name and capacity; made its own tax returns to the United States; paid under its protest, upon demand of the governmental taxing agencies, the excess tax and interest which are the subject matter of this action, and claimed the right to refund of the illegally collected manufacturer's tax *sui juris*. It is significant upon the question as to the "person" who paid the tax and as to plaintiff's right to recover it, to note that all of the money sued for was paid or "caused" to be paid by Pacific Goodrich Rubber Company, and that such payments were made partly before and partly after June 30, 1934.

Even the assignments relied on by the plaintiff company recite that they are made upon good and

valuable [77] considerations inuring to the Pacific Goodrich Rubber Company, and the record before this court does not disclose what items made up these considerations. There is no adequate showing before us to warrant the application in this tax refund case of an alter ego principle of law. It is clear that for the protection of the Government and to prevent circuitous concealments of taxpayers the statutory requirement for tax refunds should be followed to the letter.

We think there is also another insuperable barrier to any refund to the plaintiff in this action under the record before us.

The burden of proving its right to refund rests throughout the action upon the plaintiff corporation and this burden is not sustained unless satisfactory evidence preponderates in plaintiff's favor, particularly that there has been no inclusion or collection by Pacific Goodrich Rubber Company of the tax in the price of the tires which have been sold by Pacific Goodrich Rubber Company. Substantially the only evidence produced upon this vital point is in the form of a stipulation entered into by Government counsel with the reservation as to its sufficiency, that the cashier and auditor of the taxpayer corporation would if called as a witness testify that he supervised, controlled and kept the books and records of the Pacific Goodrich Rubber Company at all times pertinent to this action and that he is familiar with and knows the prices at which tires were sold by the taxpayer at all applicable times:

that he knows that during the period from August 1, 1933, to January 5, 1934, the taxpayer did not include or intend to include in the price of tires sold during such period any amount to cover any excise tax on the processed cotton contained in the tires manufactured [78] and sold during such period; that the prices at which the taxpayer sold tires during such period were no greater on tires containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act than the prices at which during such period it sold tires containing processed cotton on which a tax was payable under Section 9 of the Triple A. No books of account or sales records were produced and no explanation for their non-production was made at the hearing, although the Government objected to the sufficiency of the proof that was offered on this crucial factual issue. We are not satisfied that the required burden of the non-passage of the tax to vendees of the taxpayer has been sustained. Judgment is ordered for the defendant. Exceptions to each party on adverse rulings.

Dated December 31, 1940.

PAUL J. McCORMICK,
United States District Judge.

[Endorsed]: Filed Dec. 31, 1940. R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy. [79]

[Title of District Court and Cause.]

MINUTE ORDER ON DECISION OF ACTION
ON THE MERITS.

Findings of fact, conclusions of law and judgment for defendant with costs ordered for defendant, upon issues of "First Amended Petition" and stipulated answer of defendant, in accordance with written conclusions of the Court on the merits of the action filed this day. Attorneys for respective parties will collaborate, prepare and present such findings of fact, conclusions of law and judgment within ten days from notice hereof. Exceptions allowed respective parties on each and every adverse ruling.

Dated December 31, 1940. [80]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

Eugene H. Blanche, the attorney of record herein for The B. F. Goodrich Company, a corporation, the plaintiff herein, having died, said The B. F. Goodrich Company, a corporation, has and does hereby substitute and appoint the firm of Newlin & Ashburn as its attorneys of record herein for and in the place of said Eugene H. Blanche.

Dated: this 20 day of January, 1941.

THE B. F. GOODRICH COMPANY

By J. L. McKNIGHT

Assistant Secretary

The undersigned do hereby accept the above substitution.

Dated: this 22 day of January, 1941.

NEWLIN & ASHBURN

RAY J. COLEMAN

[Endorsed]: Filed Feb. 3, 1941. R. S. Zimmerman, Clerk. [81]

[Title of District Court and Cause.]

NOTICE OF MOTION TO REOPEN CASE
TO ADMIT FURTHER PROOF

To the Above Named Defendant and to Its Attorneys William Fleet Palmer, United States Attorney, and Armond Monroe Jewell, Assistant United States Attorney:

You and Each of You Will Please Take Notice that on Monday, the 17th day of February, 1941, at ten o'clock A. M., or as soon thereafter as counsel can be heard, in Courtroom No. 8 of the above entitled court in the Federal Building, in the City of Los Angeles, California, the plaintiff will move the court to reopen the trial of this action to permit plaintiff to offer further evidence to prove or tending to prove (a) that the tax, the refund of which is sought in this action, was not passed on to the vendees of plaintiff's predecessor in interest, (b) that plaintiff acquired the right to the refund of said tax by operation of law upon the dissolution of plaintiff's predecessor in interest and the distribu-

tion of all of its assets to the plaintiff, (c) that there was no consideration for [83] the written assignments to it of the assets of its predecessor in interest, including the right to the refund of said tax, other than such consideration as normally flows from a distribution in liquidation, (d) that plaintiff is the proper party under Sec. 621(d) of the Revenue Act of 1932 to assert the rights of and establish the facts required to be established by "the person who paid the tax," (e) that it was and is the policy and practice of the Commissioner of Internal Revenue to permit the transferee by operation of law of a right to the refund of manufacturer's excise taxes to assert the rights of and establish the facts required to be established by "the person who paid the tax," and (f) that plaintiff's predecessor in interest although a separate corporation was a wholly owned subsidiary of the plaintiff, that said corporation and the plaintiff had common officers and an interlocking board of directors and that plaintiff's predecessor in interest was operating with a deficit at the time the tax sought to be recovered herein was paid and that as a consequence the payment of said tax although made by check of the plaintiff's predecessor in interest actually reduced plaintiff's assets; to permit the plaintiff to amend its First Amended Petition to conform with the proof; to permit the defendant to offer such evidence in rebuttal as it may see fit; and to permit further argument of counsel upon such evidence as may be received by the court.

That said motion will be based upon the following grounds:

1. That the further evidence sought to be introduced to prove the facts alleged in item (a) on page 1 above would have been offered at the trial except for the fact that plaintiff and its counsel were of the opinion, based upon conversations with defendant's counsel prior to trial and upon the stipulation of counsel for plaintiff and defendant made in open court, that no right was reserved in the defendant to object to the testimony set forth in the stipulation of facts on the ground that it was not the best evidence and that plaintiff and its counsel were not aware of any misunderstanding or [84] basis for misunderstanding of counsel with reference thereto and did not anticipate that said stipulation made in open court would or could be construed by the court to permit the defendant to object to such testimony on the ground that it was not the best evidence;

2. That the further evidence sought to be introduced to prove the facts alleged in items (b) and (c) on page 1 above would have been offered at the time of trial except for the fact (1) that the plaintiff by its First Amended Petition intended to and thought that it had based its right of recovery solely upon the transfer to it by operation of law of the right to the refund of said tax, (2) that the defendant neither alleged nor urged any defense based upon the contention that plaintiff's right of recovery was bottomed upon said written assignments, (3) that the plaintiff did not allege in its

First Amended Petition or otherwise contend that said assignments were executed for a valuable consideration other than that which normally flows from a distribution in liquidation, nor did the defendant so contend either by defenses raised in its answer or otherwise, and (4) that plaintiff and its counsel were of the opinion that the evidence introduced at the time of trial was sufficient to conclusively prove that the right to the refund of said tax was transferred to the plaintiff by operation of law upon the distribution to it in liquidation of the assets of its predecessor in interest and that said assignments, as alleged in plaintiff's First Amended Petition, were only physical evidence of the distribution in liquidation and that there was no consideration therefor other than that which normally flows from such distribution;

3. That the further evidence sought to be introduced to prove the facts alleged in items (d), (e) and (f) on pages 1 and 2 above would have been offered at the time of trial except for the fact that the claims for refund which were filed by the plaintiff and its predecessor in interest were not rejected on the ground that [85] the plaintiff was not "the person who paid the tax" within the meaning of that phrase as used in Sec. 621 (d) of the Revenue Act of 1932, that no defense to that effect was expressly alleged in the defendant's answer or asserted by the defendant at time of trial or in the brief which it filed with the court, and that it was the understanding of the plaintiff and its counsel

that it was the established policy and practice of the Commissioner of Internal Revenue to permit the transferee by operation of law of a right to the refund of manufacturer's excise taxes to assert the rights of and establish the facts required to be established by "the person who paid the taxes";

4. That the further evidence sought to be introduced is essential to a proper determination of the issues presented in this case and in the interests of justice should be presented to the court for its consideration;

5. That the further evidence sought to be introduced relates either to issues on which such evidence was deemed unnecessary by reason of stipulation of counsel or to defenses which the plaintiff with good excuse did not anticipate since they were not urged by the Commissioner of Internal Revenue in advance of trial or by the defendant at time of trial and were first advanced by the court itself after the trial had been concluded and the briefs of both parties submitted.

That said motion will be based upon this written notice thereof and upon the memorandum of authorities and the affidavits of F. C. Leslie, George Hubbell and S. M. Jett hereto annexed, and upon the minutes, records and files of the above entitled court in this cause.

Dated: Feb. 3, 1941.

NEWLIN & ASHBURN

By RAY J. COLEMAN

Attorneys for Plaintiff [86]

[Title of District Court and Cause.]

MEMORANDUM OF AUTHORITIES IN
SUPPORT OF MOTION TO REOPEN

1. When the trial judge after submission of a case concludes that material and necessary testimony which has been offered is not competent he should reopen the case of his own motion to admit further proof.

Paine v. St. Paul Union Stockyards Co., 28 F.
(2d) 463, 467;

4 Cyc. of Fed. Proc., Sec. 1454, p. 998.

2. Until final judgment the case is under the control of the court which may reopen it for further proof at any time.

G. Amsinck & Co. v. Springfield Grocer Co.
7 F. (2d) 855, 858;

4 Cyc. of Fed. Proc., Sec. 1454, p. 998.

3. The assignment by a corporation to its stockholders of a claim against the United States merely passes legal title to such claim to parties who already own the entire beneficial interest [87] therein and such assignment even in the absence of a formal dissolution of the corporation is not rendered void under Section 3477 of the Revised Statutes where the assignment of such claim together with the other assets of the corporation is intended to effect a distribution in kind of all of the assets of the corporation.

Novo Trading Corp. vs. Commissioner of Internal Revenue (C. C. A. 2) 113 F. (2d) 320;

Kingan & Co. v. United States, 44 F. (2d) 447, 451;

Consolidated Paper Co. v. United States, 59 F. (2d) 281, 288; cert. den. (1933) 77 L. ed. 988.

4. In the event of the transfer of a claim against the United States, which transfer is not rendered void under Section 3477 of the Revised Statutes, the transferee rather than the transferor of such claim is the proper party to file the refund claim and to maintain a suit to recover on the claim.

G. C. M. 21058; C. B. 1939-1 (Part I) p. 280; Monarch Mills v. Jones, 56 F. (2d) 180, 183; (Aff'd 59 F. (2d) 502.)

Consolidated Paper Co. v. United States, 59 F. (2d) 281, 288; cert. den. (1933) 77 L. ed. 988.

Kingan & Co. v. United States, 44 F. (2d) 447, 451;

National Foods, Inc. v. United States, 13 F. Supp. 364; 82 Ct. Cl. 627; cert. den. Oct. 12, 1936;

5. The transferee by operation of law of the right to a refund of manufacturer's excise taxes is the proper party under Sec. 621(d) of the Revenue Act of 1932 to assert the rights of and establish the facts required to be established by "the person who paid the tax."

G. C. M. 21058; C. B. 1939-1 (Part I) p. 280.

In G. C. M. 21058, *supra*, G. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, made the following statements: [88]

“It is held, therefore, that title to the claim in the present case was obtained by the N Company by operation of law and that the provisions of section 3477 did not preclude its transfer.

“The question remains as to whether a proper claim for refund has been filed in this case.

“Section 903 of the Revenue Act of 1936 provides that ‘No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person * * *.’ The person who paid the tax in this case was the M Company. However, that company, if still in existence, has neither interest nor title to the claim for refund. The N Company ‘stands in the shoes’ of the M Company, having acquired all right, title, and interest in the claim against the Government. In *National Foods, Inc., v. United States* (82 Ct. Cl., 627, 13 Fed. Supp. 364, certiorari denied October 12, 1936) it was held that the assignor of a claim against the Government (which claim had been transferred by operation of law) was not the proper party to maintain a suit to recover on the claim. It is held in the present case that the N Company is the proper party to file the refund claim.” [89]

[Title of District Court and Cause.]

AFFIDAVIT OF F. C. LESLIE
IN SUPPORT OF MOTION TO REOPEN

United States of America,
State of Ohio,
County of Summit—ss.

F. C. Leslie, being by me first duly sworn, deposes and says:

That affiant is the assistant counsel for The B. F. Goodrich Company, a corporation, the plaintiff herein, and as such was present at the trial of the above entitled action before the above named court on February 10, 1940, and participated in said trial after having first secured the consent of the court so to do.

That Eugene H. Blanche, the attorney of record for the plaintiff herein at the time of the trial and for some time prior thereto, died before the entry on December 31, 1940, of the court's "Minute Order on Decision of Action on the Minutes."

That affiant participated in the preparation of the stipulation of facts which was filed in said action and is familiar with [90] the terms thereof and with the conditions upon which it was agreed by counsel for plaintiff and defendant that the same might be filed with the court; that said conditions were stated by said Eugene H. Blanche in open court at the time of trial in the following words:

"By stipulation of counsel for the Government there will be no question of a foundation

raised. However, there may be raised, either at this time, or at the time of the filing of the brief, a question regarding, or questions regarding, the materiality of the facts stipulated to, the relevancy of the facts stipulated to and of the sufficiency of the proof made.

“We appreciate that the latter may always be raised, but in order that there may be no misunderstanding, we make that statement.

“The latter sufficiency of the proof made particularly pertains to the question of whether the tax was passed on to the consumer or whether the tax was subsequently billed by the consumer after the tax was assessed and levied.”

That prior to the trial of said action and the making of said statement in open court, one or more conferences were held in the City of Los Angeles, at which said Eugene H. Blanche, the affiant, and Armond Monroe Jewell, the attorney for the defendant were present and at which the stipulation of facts and the conditions under which it would be filed were discussed. That at one or more of said conferences and in particular at a conference held at the office of the plaintiff in Los Angeles County, California, at which George Hubbell, an officer of the Pacific Goodrich Rubber Company, was also present, it was agreed that the stipulation of facts should be filed without the reservation of any objection except as to the ma-

teriality and relevancy of the stipulated facts and as to the sufficiency of the proof made. That at that time, said Armond Monroe Jewell stated that his reservation as to the sufficiency of the proof did not go to the foundation of the stipulated testimony and in the discussion as to whether or not a reservation should be preserved, said Jewell gave as one of his reasons for wanting such reservation that it had been the Commissioner's theory in other cases that the establishment of the fact that [91] the tax was not included in the price charged to the purchaser did not conclusively establish or prove that the tax was not passed on to the purchaser; that after the filing of the defendant's brief in said action, in which the objection to the testimony of said George Hubbell was first raised on the ground that it was not the best evidence, the said Eugene H. Blanche stated to affiant that it was never his intention that there should be reserved in either the plaintiff or the defendant any right to object to the testimony set forth in the stipulation on the ground that it was not the best evidence and that it was not and never had been his understanding that such right had been reserved; that on the contrary it was his intention and understanding, as stated in open court in the presence of counsel for the defendant, that "there (would) be no question of a foundation raised" and that any objection to the sufficiency of the proof made would be such an objection as might "always be raised," that is, an objection based

upon a failure to sustain the burden of proof rather than a failure to produce the best evidence.

That based upon the aforementioned discussions with said Armond Monroe Jewell, the attorney for the defendant; upon statements made by Eugene H. Blanche to affiant prior to the time of trial with reference to his understanding of the purpose of the reservation of the right to object to the sufficiency of proof and upon the affiant's own independent interpretation and understanding of the above quoted statement made by said Eugene H. Blanche in open court, it was the belief of affiant at the time of trial and still is his belief that no right was reserved in the defendant to object to the testimony of George Hubbell as set forth in the stipulation of facts on the ground that it was not the best evidence; that had affiant known that counsel for defendant did not concur in this belief and that there was a misunderstanding between counsel for plaintiff and defendant as to the reservation of such right or that the above quoted statement of said Eugene H. Blanche would be construed by the court as [92] reserving such right in the defendant, affiant would have and could have caused to be produced in court at the trial of said action books and records of Pacific Goodrich Rubber Company, the predecessor of the plaintiff, which, together with other competent and admissible testimony interpreting such books and records in conformity with the policy, intent and practices

of such corporation, would have confirmed the testimony of said George Hubbell as to the ultimate facts as set forth in the stipulation of facts, and would have shown that the tax in question was not passed on to the vendees of said corporation.

That the First Amended Petition of the plaintiff was filed in said action pursuant to the instructions and advice of the affiant and it was the intent of the affiant as therein alleged, and said Eugene H. Blanche stated to affiant that it was his intention as therein alleged, to base the plaintiff's right of recovery solely upon the fact that the plaintiff as the sole shareholder of Pacific Goodrich Rubber Company "became by operation of law, pursuant to a distribution in kind to it by Pacific Goodrich Rubber Company, the sole owner of and vested with title to" the right to secure the refund of the taxes in question. That in conformity with such intent and as proof of said allegations of the First Amended Petition and the further allegations that the two written assignments of assets which were executed by Pacific Goodrich Rubber Company in favor of the plaintiff on June 30, 1934, and August 14, 1935, respectively, were merely "physical evidence, affirmative proof and in confirmation of" said "distribution in kind" the plaintiff caused to be introduced in evidence at the time of trial the testimony of J. C. Herbert that the plaintiff was, at all times, the sole stockholder of Pacific Good-

rich Rubber Company and that said Company was dissolved on or about December 21, 1934, and also caused to be introduced in evidence a certified copy of the certificate of dissolution of said corporation dated December 21, 1934, and [93] certified copies of the minutes of the special meetings of the Board of Directors and stockholders of said corporation held on July 6, 1934, in which is set forth the duly adopted resolutions of said bodies to dissolve the Pacific Goodrich Rubber Company and to ratify the action previously taken by its management in transferring and delivering over all of its assets to the plaintiff "as a distribution in kind to the stockholders of all the assets of said corporation" and in which stockholders' minutes there appears the statement that said corporation "acting through its officers, had transferred and delivered over to The B. F. Goodrich Company at the close of business on June 30, 1934, all of its assets in anticipation of the immediate dissolution of the Company." That said Eugene H. Blanche stated to affiant that it was his belief and it also was and is the belief of affiant that such testimony and evidence conclusively proved the aforementioned allegations of the First Amended Petition and also conclusively proved that said written assignments of assets were, as alleged in said petition, only physical evidence and affirmative proof of said distribution in kind and that there was no consideration for said assignments other than that which normally flows from

a distribution in liquidation; that said Eugene H. Blanche also stated to affiant that it was his belief that it also was and is the belief of affiant that, even if such testimony and proof did not conclusively prove that there was no consideration for said assignments other than that which normally flows from a distribution in liquidation, that said assignments, to the extent that they embraced claims against the United States, were nevertheless void and of no effect as instruments of transfer apart from the distribution in liquidation and, being void, such testimony and evidence did conclusively prove that all claims against the United States which remained in the Pacific Goodrich Rubber Company [94] by reason of such invalidity, passed to the plaintiff by operation of law upon the dissolution of the Pacific Goodrich Rubber Company. That had there been any issue raised by the pleadings or had the defendant asserted any defense based upon the contention that the plaintiff was relying either in whole or in part upon the two aforementioned assignments as the basis for its recovery or had affiant known that the court, as noted on page 7 of its Conclusions on the Merits, would construe the allegations of said First Amended Petition as an assertion by the plaintiff of the right of recovery not only "by reason of its sole ownership of the capital stock and assets of the taxpayer" but "also because of two assignments to it dated June 30, 1934, and August 14, 1935, respectively"

or had the defendant asserted any defense or advanced any contention to the effect that said assignments were not executed and delivered as a step in the dissolution of the Pacific Goodrich Rubber Company or that said assignments were executed and delivered for a valuable consideration other than that which normally flows from a distribution in liquidation or had affiant known or anticipated that further evidence in this connection would be desired by the court, despite the invalidity of such assignments as instruments of transfer apart from the distribution in liquidation, affiant would have asked leave of the court to amend said First Amended Petition to more clearly express the intent of the plaintiff to base its right of recovery solely upon the rights acquired by it through operation of law upon the distribution in liquidation and affiant could and would have caused to be offered in evidence competent and admissible testimony of an executive officer or officers of the B. F. Goodrich Rubber Company and [95] Pacific Rubber Company, who brought about such "distribution in kind" on June 30, 1934, that such distribution was intended to be and was in fact a distribution in liquidation and was made in anticipation of the immediate dissolution of said Pacific Goodrich Rubber Company, that the two aforementioned assignments were executed by Pacific Goodrich Rubber Company in favor of plaintiff for the sole purpose of evidencing such transfer, that there was no agreement or understanding between the

Pacific Goodrich Rubber Company and the plaintiff for the payment of any consideration for the transfer of said assets and that there was no consideration for such transfer or for said assignments other than the surrender by the plaintiff in due course of dissolution of its shares of stock of Pacific Goodrich Rubber Company for cancellation.

That the claims for refund which were filed by the plaintiff were not rejected by the Commissioner of Internal Revenue on the ground that the plaintiff was not "the person who paid the tax" within the meaning of that phrase as used in Sec. 621 (d) of the Revenue Act of 1932, nor was any defense to that effect expressly alleged in the defendant's answer or asserted by the defendant at time of trial or in the brief which it filed with the court. That by reason of these facts and the further fact that it was the established policy and practice of the Commissioner of Internal Revenue, as understood by affiant, to permit the transferee by operation of law of a right to the refund of manufacturer's excise taxes to assert the rights of and establish the facts required to be established by "the person who paid the tax," the affiant was [96] of the belief that the plaintiff could properly assert the rights of and establish the facts which under the provisions of Sec. 621 (d) of the Revenue Act of 1932 are required to be established by "the person who paid the tax;" that had affiant anticipated any possibility of the contention being advanced that under said Sec. 621 (d) of the Revenue

Act of 1932 plaintiff could not assert the rights of or establish the facts required to be established by "the person who paid the tax," or had affiant anticipated that there would be any uncertainty in the court's mind with reference thereto he could and would have attempted to subpoena the Collector of Internal Revenue or other proper agent of the defendant to testify with reference to the aforementioned practice and policy of the Commissioner of Internal Revenue, and could and would have caused to be offered in evidence competent and admissible testimony to the effect that the Pacific Goodrich Rubber Company, although a separate corporation, was a wholly owned subsidiary of the plaintiff, that said corporation and the plaintiff had mutual officers and interlocking Boards of Directors, and that said Pacific Goodrich Rubber Company was operating with a deficit at the time the tax sought to be recovered herein was paid and that as a consequence, the payment of said tax, although made by check of the Pacific Goodrich Rubber Company, actually reduced plaintiff's assets.

[97]

That affiant is of the firm conviction that the plaintiff can, and if given an opportunity to do so will, introduce evidence conclusively proving that the taxpayer bore the burden of the tax sought to be recovered in this action and that said tax was not passed on to the customers of the taxpayer.

F. C. LESLIE

Subscribed and sworn to before me, the undersigned authority, on this the 30th day of January, 1941.

ALBERTA M. TEWERS,

Notary Public in and for
said State and County.

My Commission Expires November 16, 1941.

(Seal) [98]

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE HUBBELL
IN SUPPORT OF MOTION TO REOPEN

United States of America,
Southern District of California,
Central Division—ss.

George Hubbell, being by me first duly sworn, deposes and says:

That during the period from August 1, 1933, to June 12, 1934, he was the auditor of the Pacific Goodrich Rubber Company, a corporation; that during the period from June 12, 1934, to June 30, 1934, he was the assistant secretary and assistant treasurer of said corporation and that at all times since June 30, 1934, he has been an assistant treasurer of The B. F. Goodrich Company, a corporation.

That at all times during the period in issue in the above entitled action, certain books of account and records of said Pacific Goodrich Rubber Com-

pany were kept under his supervision and control; that he is familiar therewith; that it was his duty to keep all such books of account and records; that all entries made in said books of account which were not made by him were made under his direct supervision; that said books of account and records were kept in the regular course of the business of said corporation; that the business of said corporation is of a character in which it is proper and customary to keep such books of account and records; that the entries in such books of account are either the original entries or the first permanent entries of the transactions recorded therein, and [99] were made at the time, or within reasonable proximity to the time, of such transactions; and that the person making such entries had personal knowledge of the transactions or obtained such knowledge from a report regularly made to him by some other person employed in the business of said corporation whose duty it was to make such report in the regular course of business.

That if called as a witness in the above entitled action, he can and will produce from the aforementioned books of account and records of said Pacific Goodrich Rubber Company invoices, inventory records, manufacturing records, sales records and cost records from which, together with certain tax records and returns and the manufacturer's excise tax schedules prepared by said corporation and made effective by it on August 1, 1933, and in conjunction with his oral testimony

interpreting the same it can be shown and will appear that the testimony of affiant, as set forth in the Stipulation of Facts filed in the above entitled action, is in all respects true and correct, and from which it can be shown and will appear and upon the basis of which he can and will testify that the tax (the refund of which is sought in the above entitled action) was not passed on to the vendees of said corporation; that all tires containing cotton held for sale on August 1, 1933, and therefore subject to the floor stocks tax, were sold and the purchasers billed therefor long before any demand was made upon said corporation to pay said tax and at a time when said corporation, as he can and will testify and as said books and records will show, had no intention of paying said tax or thought of being required to pay it; that no additional sums were charged to or collected from said purchasers after demand for and payment of said tax.

That in particular said books and records will show and, upon the basis thereof, affiant can and will testify that effective August 1, 1933, said corporation prepared and released for its own use revised schedules of the manufacturer's excise tax payable [100] upon the sale of tires containing cotton; that the amount of the manufacturer's excise tax specified in said revised schedules was the net excise tax, namely, the excise tax less the credit for floor stocks or processing tax payable upon the cotton contained in said tires; that sub-

sequent to August 1, 1933, said revised schedules were used in determining the cost to the corporation of all tires manufactured and sold by it, and in determining the amount of the manufacturer's excise tax to be charged to those customers who were billed with said tax as a separate item.

That said books and records will further show and, upon the basis thereof, affiant can and will testify that said corporation had two types of customers, namely, original equipment customers and general wholesale customers; that on all invoices to original equipment customers the net excise tax, namely, the excise tax less the credit for the floor stocks or processing tax, was charged as a separate item; that on all invoices to general wholesale customers no separate charge was made for excise taxes, but, in determining the cost to the corporation of the tires sold to such customers, only the net excise tax, namely, the excise tax less the credit for floor stocks or processing tax, was included.

GEORGE HUBBELL

Subscribed and sworn to before me this 30th day of January, 1941.

ELIZABETH AKERMAN,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires Dec. 3, 1942.

(Seal) [101]

[Title of District Court and Cause.]

AFFIDAVIT OF S. M. JETT
IN SUPPORT OF MOTION TO REOPEN

United States of America,
State of Ohio,
County of Summit—ss.

S. M. Jett, being by me first duly sworn, deposes and says:

That he is the secretary and a member of the Board of Directors of The B. F. Goodrich Company, the plaintiff in the above entitled action.

That at all times during the period from August 1, 1933, to December 21, 1934, he was the secretary and a member of the Board of Directors of the Pacific Goodrich Rubber Company and of The B. F. Goodrich Company.

That he was familiar with and had personal knowledge of the business and affairs of said Pacific Goodrich Rubber Company during said period from August 1, 1933, to December 21, 1934, and if called as a witness in the above entitled action he can and will testify of his personal knowledge as follows: [102]

That all of the stock of the Pacific Goodrich Rubber Company from the date of its issuance until the dissolution of said corporation was owned by The B. F. Goodrich Company; that on June 30, 1934, and for some time prior thereto six of the seven directors of Pacific Goodrich Rubber

Company were officers of The B. F. Goodrich Company and five of these six were also directors of The B. F. Goodrich Company.

That on June 30, 1934, Mr. J. D. Tew was the President and a member of the Board of Directors of the Pacific Goodrich Rubber Company. That on said date said J. D. Tew on behalf of said corporation and in his capacity as the President thereof, executed in the presence of affiant the written assignment of the assets of said corporation to The B. F. Goodrich Company, a copy of which assignment is set forth in the first amended petition of the plaintiff in the above entitled action.

That on June 12, 1934, the Board of Directors of The B. F. Goodrich Company, at a meeting duly called and held and at which a quorum was present and acting, by unanimous vote "Resolved, that the officers of the company be and they hereby are authorized to so alter the methods of distribution of the products manufactured by this company as to eliminate as far as feasible sales through subsidiary corporations and to report their action in this respect to this Board."

That prior to the execution of said assignment an informal meeting of a majority of the Board of Directors of said Pacific Goodrich Rubber Company, was held at Akron, Ohio, at which meeting the affiant, said J. D. Tew, S. B. Robertson and T. B. Tomkinson were present. That at said meeting it was proposed that said corporation be dissolved, that all of its assets be distributed in kind

to its sole stockholder, The B. F. Goodrich Company; that such distribution be made on June 30, 1934, and that meetings of the Board of Directors and of the stockholders of said Pacific Goodrich Rubber Company be held as soon as reasonably possible thereafter to authorize such dissolution and to ratify the act of said corporation in making said distribution in kind; that the affiant and all other persons present at said meeting expressed their consent and approval of said proposal. [103]

That meetings of the Board of Directors of the stockholders of said Pacific Goodrich Rubber Company were held at Akron, Ohio, on July 6, 1934, and certified copies of the minutes of said meetings were furnished by affiant for introduction in evidence at the trial of the above entitled action. That at said meetings said J. D. Tew, as President of said corporation, announced that the corporation acting through its officers had transferred and delivered over to The B. F. Goodrich Company at the close of business on June 30, 1934, all of its assets in anticipation of the immediate dissolution of the corporation, and it was unanimously resolved that said corporation be dissolved and that the act of the management in making said distribution in kind be and it was ratified.

That said assignment of June 30, 1934, was executed by said J. D. Tew as President of the Pacific Goodrich Rubber Company and attested by affiant as Secretary of said corporation solely for the purpose of evidencing said distribution in

kind. That there was no agreement or understanding between the Pacific Goodrich Rubber Company and The B. F. Goodrich Company for the payment of any consideration for said assignment or for said distribution in kind, and there was no consideration of any kind received by the Pacific Goodrich Rubber Company or intended to be received by it for said assignment other than the surrender for cancellation by The B. F. Goodrich Company in due course of dissolution of its shares of stock in said Pacific Goodrich Rubber Company.

S. M. JETT

Subscribed and sworn to before me this 28 day of January, 1941.

RUTH REES,

Notary Public.

My commission expires Aug. 28, 1941.

(Seal)

[Endorsed]: Notice of Motion to Reopen Case, etc., Filed Feb. 3, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy. [104]

[Title of District Court and Cause.]

AFFIDAVIT OF ARMOND MONROE JEWELL,
IN OPPOSITION TO MOTION TO
REOPEN.

State of California,
County of Los Angeles—ss.

Armond Monroe Jewell, being first duly sworn, deposes and says:

That affiant is an Assistant United States Attorney for the Southern Judicial District of California and, as such, prepared the above entitled case for trial on behalf of the United States of America, defendant; and that affiant, as such Assistant United States Attorney, was present at the trial of the above entitled matter before the above named Court on February 10, 1940 and represented the said United States of America, defendant at the said trial;

That affiant represented the said United States of America, defendant, in the preparation of the Stipulation of Facts, which was filed in said action and therefore is familiar with the provisions thereof; that prior to said trial several conferences with reference to the Stipulation of Facts were held in the City of Los Angeles;

That these conferences were originally held between Eugene H. Blanche, now deceased, then counsel for plaintiff, and affiant; that a few days before trial Mr. F. C. Leslie, Assistant Counsel for the B. F. Goodrich Company, plaintiff herein, arrived

from Akron, Ohio, and participated in one or two of these conferences;

That at these conferences the Stipulation of Facts was discussed [106] and prepared;

That at these conferences the issue as to whether or not plaintiff had passed on the burden of the tax was discussed; that, in particular, there was discussed the manner in which plaintiff would attempt to prove that said burden of the tax had not been passed on; that affiant was informed by Mr. Blanche that it was his intention to call Mr. George Hubbell and Mr. J. C. Herbert, both officers of the plaintiff, and of the plaintiff's predecessor, and from them to adduce verbal testimony to the effect that the burden of the tax had not been passed on; that, as is customary with affiant in order to save the time of the Court in the trial of these tax cases, affiant suggested that if he were personally permitted to discuss the matter with Messrs. Hubbell and Herbert, he would stipulate as to what these witnesses might testify if they were called as witnesses and, thus, save the time of the Court at the trial; that, whereupon, affiant talked to Messrs. Hubbell and Herbert and, as a result of these conversations, he became personally convinced that they would unqualifiedly so testify were they called to Court;

That affiant and counsel for plaintiff then prepared a Stipulation which set forth what both of the respective counsel believed would be the testimony of these witnesses were they called to testify;

that at one of these conferences (the particular conference is not recalled by affiant) it was expressly agreed between affiant and Mr. Eugene H. Blanche that all reservations as to the sufficiency of the testimony to sustain the burden of proof of plaintiff would be reserved and, further, that affiant specifically cautioned the said Eugene H. Blanche that affiant did not believe that the verbal testimony of Messrs. Hubbell and Herbert was sufficient in that it was not the best evidence and affiant suggested that the books and records of plaintiff or plaintiff's predecessor, if any, were the only proper proof;

That at no time was it the intention of affiant to agree in [107] stipulating to what Messrs. Herbert and Hubbell would testify if they were called, that affiant on behalf of defendant waived the right to object to the introduction of these stipulations re testimony on the ground that the same were not the best evidence of the facts which the stipulations re testimony sought to prove;

That when Mr. Blanche in open court made the statement with reference to the Stipulation of Facts, that "By stipulation of counsel for the Government there will be no question of a foundation raised" affiant assented to the statement; that in so doing affiant did not intend to waive the right to object to the stipulated testimony upon the ground that it was not the best evidence.

ARMOND MONROE JEWELL

Subscribed and Sworn to before me, this 14 day of April, 1941.

[Seal]

R. S. ZIMMERMAN,

Clerk, U. S. District Court,
Southern District of California,

By LOUIS J. SOMERS,

Deputy.

[Endorsed]: Filed Apr. 14, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy. [108]

At a stated term, to-wit: The February Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday, the 15th day of April in the year of our Lord one thousand nine hundred and forty-one.

Present: The Honorable: Paul J. McCormick, District Judge.

[Title of Cause.]

This cause coming on for hearing on motion of the plaintiff to re-open the case and to admit further proof, pursuant to notice, filed February 3, 1941; Ray J. Coleman, Esq., appearing as counsel for the plaintiff; A. M. Jewell, Assistant U. S. Attorney, appearing as counsel for the Government; and C. W. Lunsford, court reporter, being present and reporting the testimony and the proceedings;

At 10:25 A. M. Attorney Coleman makes a statement in support of motion; at 10:40 A. M. Attorney Jewell makes a reply statement in opposition; and at 10:50 A. M. Attorney Coleman makes closing statement in support of motion.

The Court renders oral opinion and orders that the motion be denied. [109]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on regularly for trial on February 10, 1940, plaintiff being represented by F. C. Leslie, Esquire, and Eugene H. Blanche, Esquire, and defendant being represented by the United States Attorney for the Southern Judicial District of California, through Armond Monroe Jewell, Assistant United States Attorney, and evidence having been offered to and received by the Court, and the cause ordered submitted upon the filing of briefs in behalf of each party, and the said briefs having been filed, and this Court having drawn its "Conclusions of the Court on the Merits of the Action", and plaintiff, by its attorneys Newlin & Ashburn, through Ray J. Coleman, Esquire, having moved to reopen the case to admit further proof, and said motion having been opposed by defendant through its attorneys above named, and the Court having denied plaintiff's said motion to re-

open the case to admit further proof, the Court now makes its Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

That on June 20, 1927, Pacific Goodrich Rubber Company was incorporated under the laws of the State of Delaware, and that said corporation was dissolved on or about December 21, 1934.

II.

That plaintiff now is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws [110] of the State of New York; and that it is and at all times mentioned herein was qualified to do business in the State of California, and has its principal office and place of business in Akron, Ohio, with an office in Los Angeles, California.

III.

That defendant herein, the United States of America, now is and at all times herein mentioned was a body politic.

IV.

That this action arose under the laws of the United States levying and providing for the collection of internal revenue, and more particularly under the Act of June 6, 1932, Chapter 209, Sec. 602, 47 Stat. 261, as modified by the Act of May 12, 1933, Chapter 25, Sec. 9 (a), 48 Stat. 35, and was brought

for the recovery of manufacturer's excise tax paid under protest by the plaintiff's predecessor in interest Pacific Goodrich Rubber Company.

V.

That the tax sought to be recovered in this action was paid to John P. Carter, the Collector of Internal Revenue for the Sixth District of California; that said John P. Carter died prior to the commencement of this action, to-wit, on or about April 24, 1935; that Nat Rogan succeeded the said John P. Carter as Collector of Internal Revenue for the Sixth District of California and still holds that position.

VI.

That on June 30, 1934, eight thousand (8,000) shares of the capital stock of Pacific Goodrich Rubber Company were issued and outstanding, and none of the shares of said stock were subscribed for but unissued; that at all times on and after June 30, 1934, the number of shares of stock of the Pacific Goodrich Rubber Company which were issued and outstanding remained unchanged; and that at no time on or after June, 1934, were any of said shares subscribed for but unissued. [111]

VII.

That at all times from the date of the first issuance of stock of the Pacific Goodrich Rubber Company up to and including the date of its dissolution all of the stock issued by Pacific Goodrich Rubber

Company was issued in the name of plaintiff or in the name of trustees for the benefit of plaintiff and plaintiff was the owner thereof.

VIII.

That, under Section 16 of the Agricultural Adjustment Act (Public No. 10, 73d Congress; May 23, 1933, c. 25, Title I, Sec. 16, 48 Stat. 40; 7 U. S. C. A. Sec. 616), plaintiff's predecessor in interest, Pacific Goodrich Rubber Company, was required to pay a tax upon the sale or other disposition of any article processed wholly or in chief value from cotton which it had on hand or in transit to it on August 1, 1933 (the date the processing tax on cotton went into effect by proclamation of the Secretary of Agriculture), in an amount equivalent to the tax which would have been paid on said cotton had it actually been processed after August 1, 1933, i. e., \$0.044184 per pound; that under Section 9 (a) of said Agricultural Adjustment Act (Sec. 9, 48 Stat. 35; 7 U. S. C. A. Sec. 609), plaintiff's said predecessor in interest was allowed to compute the manufacturer's excise tax on tires levied by Section 602 of the Revenue Act of 1932 by deducting from the weight of said tires the weight of processed cotton in said tires upon which a processing tax, including a floor stocks tax, had been paid under Section 9 (a) or Section 16 (a) of the Agricultural Adjustment Act.

IX.

That on August 1, 1933, plaintiff's predecessor in interest, Pacific Goodrich Rubber Company, held

for sale or other disposition articles processed wholly or in chief value from cotton, to wit, tire fabrics, threads and other materials having a total cotton content of 782,474 pounds, said articles being hereinafter referred to as pro- [112] cessed cotton; that pursuant to Sec. 16 of the Agricultural Adjustment Act and the Regulations of the Secretary of the Treasury established thereunder, the plaintiff's predecessor in interest, the Pacific Goodrich Rubber Company, duly prepared and filed with John P. Carter, now deceased the then Collector of Internal Revenue for the Sixth District of California, its return reporting the sale or other disposition of the said processed cotton of 782,474 pounds, and paid to said Collector a tax thereon at the rate of \$0.044184 per pound as duly fixed by the Secretary of Agriculture in the total sum of \$34,648.08. That said tax was paid in four installments as follows:

August 31, 1933.....	\$ 7,368.06
September 30, 1933.....	7,368.06
October 31, 1933.....	11,249.98
November 30, 1933.....	8,666.03

That no portion of said tax of \$34,648.08 has been refunded or credited to plaintiff or to plaintiff's predecessor in interest Pacific Goodrich Rubber Company.

X.

That during the period from August 1, 1933, through January 5, 1934, Pacific Goodrich Rubber

Company manufactured and sold tires (exclusive of tax free tires sold to the government for export) which contained 705,806 pounds of the aforementioned 782,474 pounds of processed cotton which were held for sale or other disposition by said company on August 1, 1933. That the other and remaining 76,668 pounds of processed cotton which Pacific Goodrich Rubber Company held for sale or other disposition on August 1, 1933, were manufactured and sold in rubber products other than tires or wasted.

XI.

That in computing the manufacturer's excise tax imposed by Sec. 602 of the Revenue Act of 1932 on the aforementioned tires manufactured and sold by Pacific Goodrich Rubber Company during the period from August 1, 1933, through January 5, 1934, said company deducted from the weight of said tires the weight of the 705,806 pounds of [113] processed cotton contained therein on which it had paid the tax imposed by Sec. 16 of the Agricultural Adjustment Act. That the manufacturer's excise tax so computed was reported by Pacific Goodrich Rubber Company by the filing of manufacturer's excise tax returns with said John P. Carter, deceased, the then Collector of Internal Revenue for the Sixth District of California, and the amount of the tax so computed, to wit, the sum of $2\frac{1}{4}$ cents per pound on the weight of said tires less the weight of the processed cotton contained therein on which the tax imposed by Sec. 16 of the Agricultural Ad-

justment Act had been paid, was paid to said Collector of Internal Revenue.

XII.

That the aforementioned computation of the manufacturer's excise tax was rejected and disallowed by the defendant and John P. Carter, deceased, the then Collector of Internal Revenue, and on or about April 10, 1934, demand was made upon the Pacific Goodrich Rubber Company by the defendant and said Collector of Internal Revenue for the payment of additional manufacturer's excise tax in the sum of \$15,880.64, together with interest thereon in the sum of \$569.74, which interest was assessed against said company on June 9, 1934; that said additional manufacturer's excise tax demanded of said Pacific Goodrich Rubber Company was a tax of $2\frac{1}{4}$ cents per pound on the 705,806 pounds of processed cotton on which said company had paid the tax imposed by Sec. 16 of the Agricultural Adjustment Act, and the weight of which, for the purpose of computing the manufacturer's excise tax, was deducted by said company from the weight of the tires manufactured and sold by it during the period from August 1, 1933, through January 5, 1934. That in response to said demand said additional manufacturer's excise tax of \$15,880.64 was paid by the Pacific Goodrich Rubber Company on or about April 18, 1934, and the interest thereon of \$569.74 was paid by the Pacific Goodrich Rubber Company on or about July 27, 1934. That said payments were

made under written protest and solely for the purpose of avoiding [114] penalties and interest, and said Collector of Internal Revenue was so advised at the time of payment. That the defendant and said Collector of Internal Revenue in arriving at the amount of the additional manufacturer's excise tax and the interest thereon to be demanded of the Pacific Goodrich Rubber Company determined for their convenience that the additional tax should be demanded for the months of November and December, 1933, and the Pacific Goodrich Rubber Company did not object to this action if demand for an additional manufacturer's excise tax was to be made but did object to any additional taxes being demanded.

XIII.

On July 6, 1934 the Board of Directors of Pacific Goodrich Rubber Company held a meeting; a true copy of the minutes of said meeting are on file herein and marked plaintiff's Exhibit "I".

XIV.

On July 6, 1934 the stockholders of the Pacific Goodrich Rubber Company held a meeting; a true copy of the minutes of said meeting are on file herein and marked plaintiff's Exhibit "I".

XV.

On August 24, 1934 the Board of Directors of Pacific Goodrich Rubber Company held a meeting; a true copy of the minutes of said meeting are on file herein and marked plaintiff's Exhibit "I".

XVI.

On June 30, 1934 the Pacific Goodrich Rubber Company executed an assignment to the plaintiff, a true copy of which assignment appears on page three of plaintiff's "First Amended Petition."

XVII.

On August 14, 1935 the Pacific Goodrich Rubber Company executed an assignment to plaintiff, a true copy of which assignment appears on pages four and five of plaintiff's "First Amended Petition."

XVIII.

That on or about August 31, 1935, each the plaintiff and the [115] Pacific Goodrich Rubber Company filed with Nat Rogan, the then Collector of Internal Revenue for the Sixth District of California, a claim for refund dated August 19, 1935, of the additional manufacturer's excise tax and interest thereon in the aggregate sum of \$16450.39 which was paid by the Pacific Goodrich Rubber Company under protest as described in paragraph XII above. That each of said claims was made upon the ground alleged therein that under Sec. 9 of the Agricultural Adjustment Act the taxpayer in computing the manufacturer's excise tax on the tires manufactured and sold by it was entitled to deduct from the weight of said tires the weight of the processed cotton therein on which it had paid a floor stocks tax under Sec. 16 of the Agricultural Adjustment Act; that as an additional reason for the

allowance of the plaintiff's claim, it was alleged therein that the plaintiff was entitled to the refund claimed by reason of the aforementioned assignment of June 30, 1934, from Pacific Goodrich Rubber Company, which assignment is described in paragraph XVI above.

XIX.

That on or about April 21, 1936, each the plaintiff and the Pacific Goodrich Rubber Company filed with Nat Rogan, the then Collector of Internal Revenue for the Sixth District of California, an amended claim for refund dated March 30, 1936, of the same tax and interest as that the refund of which was claimed in their original claims for refund described in paragraph XVIII above. That each of said amended claims for refund alleged the same grounds for its allowance as those alleged in the original claims for refund, and each alleged in addition the further reason for its allowance that the taxpayer did not include the tax, the refund of which was claimed, in the price of the articles on which said tax was imposed, nor did it collect the amount of said tax from the persons to whom said articles were sold. [116]

XX.

That on May 22, 1936 the Commissioner of Internal Revenue by letter addressed to the plaintiff rejected in full both the original and amended claims for refund of the plaintiff on the ground that there

was on file in his office a claim filed by the Pacific Goodrich Rubber Company for refund of the same tax, based on the same contentions, and that the plaintiff's claims were therefore duplicate claims. That on April 8, 1936, the Commissioner of Internal Revenue rejected the original claim for refund of the Pacific Goodrich Rubber Company, and on May 22, 1936, by letter addressed to the Pacific Goodrich Rubber Company said Commissioner rejected in full the amended claim for refund of said company. That said rejections of the claims of the Pacific Goodrich Rubber Company were made on the grounds that the proper interpretation of Sec. 9 (a) of the Agricultural Adjustment Act did not entitle said company to a credit for the floor stocks tax paid on the cotton contents of tires in computing the manufacturer's excise tax. That neither the whole or any part of said additional manufacturer's excise tax and interest in the aggregate sum of \$16,450.39, which was paid by the Pacific Goodrich Rubber Company under protest as aforesaid, has been repaid or refunded to the plaintiff or to the Pacific Goodrich Rubber Company, and no other action than the filing of said claims for refund and the bringing of this action has been brought or taken by the plaintiff or the Pacific Goodrich Rubber Company for the recovery of said tax and interest.

XXI.

That on July 8, 1936, the plaintiff filed with the Collector of Internal Revenue at Akron, Ohio, a

claim for abatement of certain taxes and interest having no relation to the taxes and interest involved in this proceeding, but in which the plaintiff described itself as the successor to the Pacific Goodrich Rubber Company, and in which it made the statement that Pacific Goodrich Rubber Company transferred its assets to The B. F. Goodrich Company on or about June [117] 30, 1934, and was dissolved December 31, 1934.

XXII.

That throughout the period from August 1, 1933, to April 10, 1934, the Pacific Goodrich Rubber Company was informed and believed that, for the purpose of computing the manufacturer's excise tax on tires manufactured and sold by it, it was entitled under the provisions of Sec. 9 (a) of the Agricultural Adjustment Act to deduct from the weight of the tires so sold the weight of the processed cotton contained therein upon which a tax had been paid either under Sec. 9 (a) or Sec. 16 of the Agricultural Adjustment Act; that Pacific Goodrich Rubber Company and plaintiff at all times prior to said April 10, 1934, believed that the tax burden with respect to such tires would amount to \$0.044184 on the processed cotton contained in said tires and 2¼ cents per pound on the remaining weight of said tires; that at no time during the period preceding April 10, 1934, did Pacific Goodrich Rubber Company or plaintiff contemplate that Pacific Goodrich Rubber Company or plaintiff would be compelled

to pay an additional manufacturer's excise tax of $2\frac{1}{4}$ cents per pound on the weight of the processed cotton contained in said tires and on which had been paid a floor stocks tax under Sec. 16 of the Agricultural Adjustment Act. That all tires containing processed cotton which was held for sale or other disposition by the Pacific Goodrich Rubber Company on August 1, 1933 were sold and billed to the purchasers or vendees of the Pacific Goodrich Rubber Company long before demand was first made upon said company that it pay an additional manufacturer's excise tax of $2\frac{1}{4}$ cents per pound on the weight of the processed cotton contained in said tires, and that after said additional tax had been demanded and paid no additional billing was made to said purchasers or vendees and no additional amount collected from them.

XXIII.

That J. C. Herbert, Secretary of the Pacific Goodrich Rubber Company, during the tax period involved herein, testified as appears [118] on pages two and three of the "Stipulation of Facts" on file herein; that George Hubbell, Assistant Treasurer of plaintiff, testified as appears on pages three, four, five, six, seven, eight, nine and ten of plaintiff's "Stipulation of Facts" on file herein.

CONCLUSIONS OF LAW

I.

That the tax imposed by Sec. 602 of the Revenue Act of 1932 on tires is a manufacturer's sales tax within the meaning of the proviso clause of Sec. 9 (a) of the Agricultural Adjustment Act; that under said Sec. 9 (a) of the Agricultural Adjustment Act the manufacturer's excise tax on tires imposed by Sec. 602 of the Revenue Act of 1932 should be computed on the basis of the weight of said tires, less the weight of the processed cotton therein on which either a processing tax imposed by Sec. 9 (a) of the Agricultural Adjustment Act or a floor stocks tax imposed by Sec. 16 (a) of said Act has been paid; that it was the intention of Congress by the use of the words "processing tax" in the proviso clause of Sec. 9 (a) of the Agricultural Adjustment Act to refer not only to the tax imposed by Sec. 9 (a) of said Act, but to the so-called floor stocks tax imposed by Sec. 16 (a) of said Act; that under Sec. 9 (a) of the Agricultural Adjustment Act the plaintiff's predecessor in interest, the Pacific Goodrich Rubber Company, was entitled to compute the manufacturer's excise tax on the tires sold by it during the period from August 1, 1933, through January 5, 1934, by deducting from the weight of said tires the weight of the processed cotton contained therein on which a floor stocks tax imposed by Sec. 16 of the Agricultural Adjustment Act had been paid.

II.

That the tax, the refund of which is sought in this action, is a manufacturer's excise tax erroneously, illegally and unjustly demanded and collected from the plaintiff's predecessor in interest, the Pacific Goodrich Rubber Company; that apart from the right of said company under the applicable revenue laws to a refund of the wrongfully demanded and collected excess taxes, it is entitled as the taxpayer to such refund under the equitable remedy of [119] money had and received.

III.

That this is not an action for the recovery of floor stocks taxes collected by the defendant under the provisions of the Agricultural Adjustment Act, and that the administrative procedure under Sec. 902 et seq. of the Revenue Act of 1936 is, therefore, inapplicable.

IV.

That the proviso clause of Sec. 9 (a) of the Agricultural Adjustment Act relating to the computation of the manufacturer's excise tax was valid and constitutional, and that it was not rendered invalid or unconstitutional, nor was the right to a refund of the additional manufacturer's excise tax, the refund of which is sought in this action, nullified by the invalidity and unconstitutionality of other provisions of that act; that in any event the tax, the refund of which is sought in this action, is

not a floor stocks tax imposed under the Agricultural Adjustment Act, but is a manufacturer's excise tax having only an indirect relation to the levy of such floor stocks tax.

V.

That the right to the refund of the tax which is sought to be recovered in this action was not acquired by the plaintiff by reason of its ownership of all of the stock of the Pacific Goodrich Rubber Company or by the dissolution of that company or by the distribution in kind by said company of all of its assets to plaintiff, but vested in plaintiff by reason of the two written assignments executed by the Pacific Goodrich Rubber Company in favor of the plaintiff on June 30, 1934, and August 14, 1935, respectively. That said assignments to the extent that they constituted assignments of a claim against the United States were absolutely null and void ab initio under the provisions of Sec. 3477 of the Revised Statutes and the plaintiff accordingly acquired no rights thereunder to the refund of the tax herein sought to be recovered. That the plaintiff [120] also acquired no right to the refund of the tax herein sought to be recovered by reason of its ownership of all of the stock of the Pacific Goodrich Rubber Company or by dissolution of that company or by the distribution in kind by said company of all of its assets to the plaintiff.

VI.

That under Sec. 621 (d) of the Revenue Act of 1932 only "the person who paid the tax" can establish the facts required by that section to be established as a condition to the allowance of a refund of such taxes under Sec. 3220 of the Revised Statutes. That the plaintiff is not "the person who paid the tax" within the meaning of that phrase as used in Sec. 621 (d) of the Revenue Act of 1932.

VII.

That plaintiff failed to establish that the tax, the refund of which is sought by this action, was not passed on to the vendees or purchasers of the Pacific Goodrich Rubber Company within the requirements of Sec. 621 (d) of the Revenue Act of 1932.

VIII.

That plaintiff should recover nothing against defendant and that defendant should have and recover of and from the plaintiff judgment for its costs of suit herein incurred.

Let judgment be entered accordingly.

Dated: August 2nd, 1941, at 3 P. M.

PAUL J. McCORMICK,

United States District Judge.

Approved as to form.

.....
Attorneys for plaintiff.

[Endorsed]: Filed Aug. 4, 1941. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy. [121]

In the District Court of the United States in and
for the Southern District of California, Central
Division.

No. 8138-M Civil

THE B. F. GOODRICH COMPANY, a corpo-
ration,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This matter having come on regularly for trial on February 10, 1940, plaintiff being represented by F. C. Leslie, Esquire, and Eugene H. Blanche, Esquire, and defendant being represented by the United States Attorney for the Southern Judicial District of California, through Armond Monroe Jewell, Assistant United States Attorney, and evidence having been offered to and received by the Court, and the cause ordered submitted upon the filing of briefs in behalf of each party, and the said briefs having been filed, and this Court having drawn and filed its "Conclusions of the Court on the Merits of the Action", and plaintiff, by its attorneys Newlin & Ashburn, through Ray J. Coleman, Esquire, having moved to reopen the case to admit further proof, and said motion having been opposed by defendant through its attorney above

named, and the Court having denied plaintiff's said motion to re-open the case to admit further proof, and the Court, after consideration of proposed findings of fact and conclusions of law submitted by respective attorneys and having made its findings of fact and conclusions of law, and filed the same herein.

Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed that plaintiff take nothing by its complaint, that the same be and hereby is dismissed and defendant have judgment for its costs taxed in the sum of \$20.00.

Dated: August 2nd, 1941, at 3:10 P. M.

PAUL J. McCORMICK,

United States District Judge.

Approved as to form.

.....
Attorneys for plaintiff.

Judgment entered Aug. 4, 1941.

Docketed Aug. 4, 1941.

Book C. O. 6, Page 129.

R. S. Zimmerman, Clerk.

By B. B. Hansen, Deputy.

[Endorsed]: Filed Aug. 4, 1941. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy. [122]

[Title of District Court and Cause.]

I, R. S. Zimmerman, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing to be a full, true, and correct copy of an original Judgment entered in the above-entitled cause and recorded in C. O. Book 6—Central Division at page 129 thereof; and I do further certify that the papers hereto annexed constitute the Judgment Roll in said cause.

Attest my hand and the seal of said District Court, this Oct. 3, 1941.

R. S. ZIMMERMAN,
Clerk.

By B. B. HANSEN,
Deputy Clerk.

(Court Seal) [123]

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION
RE EXHIBITS

It Is Hereby Stipulated And Agreed by and between the parties hereto by their respective attorneys, as follows:

1. That Plaintiff's Exhibit "F", being a claim for refund dated August 19, 1935, (referred to in page 6, line 9 of Transcript) is Exhibit "D" referred to in line 20, page 8 of the Stipulation of Facts in the above entitled matter.

2. That Plaintiff's Exhibit "G", being the amended claim for refund of The B. F. Goodrich Company (line 13, page 9 of Transcript) is the exhibit referred to as Exhibit "E", line 29 page 8 of said Stipulation of Facts.

3. That Plaintiff's Exhibits "H-1" and "H-2", being letters addressed to The B. F. Goodrich Company and signed by Guy T. Helvering, Commissioner, by D. S. Bliss, Deputy Commissioner, (lines 22, 24, 25 and 26, page 9 of Transcript), and Plaintiff's Exhibit "H-3" (line 2, page 10 of Transcript) is Exhibit "F" referred to in line 6, page 9 of said Stipulation of Facts.

Dated: March 9th, 1940.

EUGENE H. BLANCHE,

F. C. LESLIE,

Attorneys for Plaintiff.

BEN HARRISON,

United States Attorney,

By ARMOND MONROE JEWELL,

Assistant United States Attorney,

Attorney for Defendant.

[Endorsed]: Filed May 28, 1940. R. S. Zimmerman, Clerk. By C. E. Hollister, Deputy Clerk. [124]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the above-named plaintiff, The B. F. Goodrich Com-

pany, and above-named defendant, United States of America, by and through their respective counsel, that the hearing on defendant's Demurrer, heretofore set for April 4th, 1938, may be continued to the 6th day of June, 1938, at 10 o'clock A. M., before the Honorable Paul J. McCormick.

Dated: April 4th, 1938.

ANDREWS, BLANCHE &
KLINE,

By EUGENE H. BLANCHE,
Attorneys for Plaintiff.

BEN HARRISON,
United States Attorney,

By FRANCIS C. WHELAN,
Assistant United States
Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Apr. 8, 1938. R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk. [125]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the above-named plaintiff, The B. F. Goodrich Company, and above-named defendant, United States of America, by and through their respective counsel, that the hearing on defendant's Demurrer, here-

tofore set for June 13th, 1938, may be continued to the 19th day of Sept., 1938, at 10 o'clock A. M., before the Honorable Paul J. McCormick.

Dated: June 9th, 1938.

ANDREWS, BLANCHE &
KLINE,

By EUGENE H. BLANCHE,
Attorneys for Plaintiff.

BEN HARRISON,
United States Attorney,

By FRANCIS C. WHELAN,
Assistant United States
Attorney,
Attorneys for Defendant

[Endorsed]: Filed Jun. 13, 1938. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy. [126]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the above-named plaintiff, The B. F. Goodrich Company, and above-named defendant, United States of America, by and through their respective counsel, that the hearing on defendant's Demurrer, heretofore set for the 1st day of August, 1938, may be continued to the 3rd day of October, 1938, at 10

o'clock A. M., before the Honorable Paul J. McCormick.

Dated: July 28th, 1938.

ANDREWS, BLANCHE &
KLINE,

By EUGENE H. BLANCHE,
Attorneys for Plaintiff.

BEN HARRISON,
United States Attorney,

By ARMOND MONROE JEWELL,
Assistant United States
Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 1, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [127]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO FILE
DEFENDANT'S BRIEF

It is hereby stipulated by and between the parties hereto, through their respective counsel, that defendant may have to and including June 3, 1940 within which to file its brief in the above entitled case.

Dated this 20 day of May, 1940.

EUGENE H. BLANCHE

By EUGENE H. BLANCHE

Attorneys for Plaintiff

BEN HARRISON

United States Attorney

EDWARD H. MITCHELL

Asst. U. S. Attorney

ARMOND MONROE JEWELL

Asst. U. S. Attorney

By ARMOND MONROE JEWELL

Attorneys for Defendant

It is so ordered this 28 day of May, 1940.

PAUL J. McCORMICK

Judge

[Endorsed]: Filed May 28, 1940. R. S. Zimmerman, Clerk. By C. E. Hollister, Deputy Clerk. [128]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO FILE
PLAINTIFF'S REPLY BRIEF

It is hereby stipulated by and between the parties hereto, through their respective counsel, that plaintiff may have to and including July 10, 1940, within which to file its reply brief in the above entitled matter.

Dated: this 11th day of June, 1940.

EUGENE H. BLANCHE

By EUGENE H. BLANCHE
Attorney for Plaintiff

BEN HARRISON,
United States Attorney

EDWARD H. MITCHELL,
Asst. U. S. Attorney

ARMOND MONROE JEWELL,
Asst. U. S. Attorney

By ARMOND MONROE JEWELL,
Attorneys for Defendant

It is so ordered this 17th day of June, 1940.

PAUL J. McCORMICK,
Judge

[Endorsed]: Filed Jun. 17, 1940. R. S. Zimmerman, Clerk. By C. E. Hollister, Deputy Clerk. [129]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO FILE
PLAINTIFF'S REPLY BRIEF

It is hereby stipulated by and between the parties hereto, through their respective counsel, that Plaintiff may have to and including July 24th, 1940, within which to file its Reply Brief in the above entitled matter.

Dated this 9th day of July, 1940.

EUGENE H. BLANCHE,
By EUGENE H. BLANCHE,

BEN HARRISON,
United States Attorney

EDWARD H. MITCHELL,
Asst. U. S. Attorney

ARMOND MONROE JEWELL,
Asst. U. S. Attorney

By ARMOND MONROE JEWELL,
Attorneys for Defendant.

It is so ordered this 10th day of July, 1940.

PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed Jul. 11, 1940. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[130]

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND
DISBURSEMENTS

Disbursements

Marshal's Fees.....	\$
Clerk's Fees	10.00
Witness' Fees	
Attorney's Docket Fees (Sec. 824	
R. S.) (Sec. 571-2 Title 28	
U. S. C.).....	10.00

\$20.00

Taxed J.M.H.

United States of America,
Southern District of California,
City of Los Angeles—ss.

Armond Monroe Jewell, being duly sworn, deposes and says: that he is one of the attorneys for Defendant in the above entitled cause, and as such has knowledge of the facts relative to the above costs and disbursements; that the items in the above memorandum contained are correct; that said disbursements have been necessarily incurred in said cause; and that the services charged herein have been actually and necessarily performed as herein stated.

(Seal)

ARMOND MONROE JEWELL,
Assistant United States Attorney

Subscribed and sworn to before me, this 8th day of August, A. D. 1941.

R. S. ZIMMERMAN,

Clerk,

U. S. District Court, Southern

District of California

By J. M. HORN,

Deputy. [131]

To Newlin and Ashburn

You will please take notice that on Monday the 11th day of August, A. D. 1941, at the hour of 9:00 o'clock A. M., defendant will apply to the Clerk of said Court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said Court, in such case made and provided.

ARMOND MONROE JEWELL,

Assistant United States Attorney

Service of within memorandum of costs and disbursements, and receipt of a copy thereof acknowledged this day of, A. D. 193.....

.....
Attorney for

[Endorsed]: Filed Aug. 8, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy. [132]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
Southern District of California—ss.

Lois Hamby, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of Los Angeles County, California; that her business address is 600 Federal Building, Los Angeles, California; that she is over the age of eighteen years, and not a party to the above-entitled action;

That on August 8, 1941 she deposited in the United States Mails in the Post Office at Temple and Main Streets, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Memorandum of Costs and Disbursements addressed to Newlin & Ashburn, 1020 Edison Building, Los Angeles, California, at which place there is a delivery service by United States Mail from said post office.

LOIS HAMBY

Subscribed and sworn to before me, this 8th day of August, 1941.

R. S. ZIMMERMAN,

Clerk,

U. S. District Court, Southern
District of California

By J. M. HORN,

(Court Seal) Deputy.

[Endorsed]: Filed Aug. 8, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy Clerk. [133]

[Title of District Court and Cause.]

NOTICE OF APPEAL.

Notice is hereby given that The B. F. Goodrich Company, a corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on August 4, 1941.

Dated: November 3, 1941.

NEWLIN & ASHBURN

RAY J. COLEMAN

Attorneys for Plaintiff

1020 Edison Building,

Los Angeles, Calif.

[Endorsed]: Copy mailed to U. S. Atty. E. L. S. Filed Nov. 3, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy. [134]

[Title of District Court and Cause.]

STIPULATION IN RE RECORD ON APPEAL

Whereas, the parties hereto have agreed that more than forty days will be required to prepare and file the record on appeal in the above entitled cause; and

Whereas, the plaintiff in the above entitled action has heretofore duly and regularly taken and perfected an appeal from the judgment heretofore made and entered herein in favor of defendant and against plaintiff;

Now, therefore, it is hereby stipulated that the time of said plaintiff and appellant to take steps for the preparation of a record on appeal in accordance with Rule 75 of the Rules of Civil Procedure may be by order of this court extended to and including the 15th day of January, 1942, and the time of said defendant and appellant to file the record on appeal and to docket said action on appeal may be by order of this court extended to [136] and including the 25th day of January, 1942.

Dated, this 29th day of November, 1941.

WILLIAM FLEET PALMER,
United States Attorney

ARMOND MONROE JEWELL,
Assistant United States Attorney

By ARMOND MONROE JEWELL,
Attorneys for Defendant and
Respondent

NEWLIN & ASHBURN,
By WILLIAM J. CURRER, JR.,
Attorneys for Plaintiff and
Appellant

It is hereby ordered that the time of appellant The B. F. Goodrich Company, a corporation, to commence the preparation of a record on appeal is hereby extended to and including January 15, 1942, and its time to file the record on appeal and to docket said action on appeal is hereby extended to and including January 25, 1942, in accordance with the foregoing stipulation.

Dated, November 29th, 1941.

PAUL J. McCORMICK,
District Judge

[Endorsed]: Filed Nov. 29, 1941. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy. [137]

[Title of District Court and Cause.]

Know All Men by These Presents:

That we, The B. F. Goodrich Company, a corporation, as Principal, and American Surety Company of New York, a corporation under the laws of the State of New York, as Surety, are held and firmly bound unto the United States of America, in the full and just sum of Two Hundred Fifty and no/100 Dollars (\$250.00) to be paid to the United States of America, or its certain attorney, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3d day of November, in the year of our Lord One Thousand Nine Hundred and Forty-one.

Whereas, lately at the District Court of the United States for the Southern District of California, Central Division, in a suit pending in said Court between The B. F. Goodrich Company, a corporation, Plaintiff, versus the United States of

America, Defendant, a judgment was rendered against the said The B. F. Goodrich Company, a corporation, and the said The B. F. Goodrich Company, a corporation, having filed a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the aforesaid suit.

Now, the condition of the above obligation is such, that if the said The B. F. Goodrich Company, a corporation, shall prosecute its appeal to effect, and answer all costs if it fails to make its plea good, or if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified, then the above obligation to be void; else to remain in full force and virtue.

THE B. F. GOODRICH COMPANY

By G. W. HUBBELL

Asst. Treas.

AMERICAN SURETY COMPANY
OF NEW YORK

By A. E. KRULL

Resident Vice President

Attest:

I. TAYLOR

Resident Assistant Secretary

Examined and recommended for approval as provided by Rule 13.

RAY J. COLEMAN

Attorney [138]

State of California,
County of Los Angeles—ss.

On this 3d day of November, A. D. 1941, before me, Lucile M. Chesley, a Notary Public in and for Los Angeles County, State of California, residing therein, duly commissioned and sworn, personally appeared A. E. Krull personally known to me to be the Resident Vice-President and I. Taylor, personally known to me to be the Resident Assistant Secretary of the American Surety Company of New York, the Corporation described in and that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

(Seal) LUCILE M. CHESLEY

Notary Public in and for the County of Los Angeles,
State of California.

My Commission expires April 16, 1945.

[Endorsed]: Filed Nov. 3, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy. [139]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL

Now comes The B. F. Goodrich Company, a corporation, the plaintiff and appellant herein, and designates for inclusion in the record to be filed in the Circuit Court of Appeals for the Ninth Circuit pursuant to the appeal taken in the above entitled action, the complete record and all the proceedings and evidence in said action including the following:

1. Petition filed herein on October 1, 1937.
2. Affidavit of service of petition by mailing, filed herein on October 6, 1937.
3. Affidavit of service of petition, filed herein on October 6, 1937.
4. Demurrer filed herein on December 3, 1937.
5. Amendment to demurrer, filed herein on April 6, 1938.
6. Amendment to petition, filed herein on May 21, 1938. [140]
7. Order that petition be amended as set forth in the aforementioned amendment to petition, said order being filed herein on May 21, 1938.
8. Second amendment to demurrer, filed herein on August 1, 1938.
9. Notice of motion for order sustaining demurrer, filed herein on August 8, 1938.

10. Minute order overruling demurrer, made on or about October 3, 1938.

11. Answer filed herein on February 3, 1939.

12. Affidavit of service of answer by mail, filed herein on February 3, 1939.

13. First amended petition, filed herein on February 5, 1940.

14. Stipulation as to filing first amended petition by plaintiff and that answer of defendant to petition as amended be the answer to the first amended petition, said stipulation being filed herein on February 5, 1940.

15. Substitution of attorneys, filed herein on February 10, 1940.

16. Stipulation of facts, filed herein on February 10, 1940.

17. Minute order submitting cause for decision on briefs, made on or about February 10, 1940.

18. Conclusions of the court on the merits of the action, filed herein on December 31, 1940.

19. Minute order on decision of action on the merits, filed herein on December 31, 1940.

20. Substitution of attorneys, filed herein on February 3, 1941.

21. Notice of motion to reopen case to admit further proof, together with the memorandum of authorities and the [141] affidavits attached thereto, said notice of motion being filed herein on February 3, 1941.

22. Affidavit of Armond Monroe Jewell in opposition to motion to reopen, filed herein on April 14, 1941.

23. Minute order denying motion to reopen, filed herein on April 15, 1941.

24. Findings of fact and conclusions of law dated August 2, 1941, and filed herein on August 4, 1941.

25. Judgment dated August 2, 1941, and filed herein on August 4, 1941.

26. Certificate dated October 3, 1941, of B. B. Hansen, Deputy Clerk of the above entitled court, certifying to the judgment and to the contents of the judgment roll.

27. All of the plaintiff's exhibits, consisting of Exhibits A, B, C, D, E, F, G, H-1, H-2, H-3, I, I-1 and J.

28. All of defendant's exhibits, consisting of Exhibits Nos. 1, 2, 3 and 4.

29. Reporter's transcript, two copies of which are filed herewith. The original was filed with the above entitled court on or about February 20, 1940, and at that time a copy was also furnished to defendant's counsel.

30. Supplemental stipulation re exhibits, filed herein on May 28, 1940.

31. Brief of plaintiff, defendant's reply brief and plaintiff's reply brief, all of which were filed with the above entitled court and all of which are deemed necessary for the proper presentation of the points on which appellant

intends to rely for the following reasons: (1) Pursuant to stipulation of counsel in open court (Rep. Tr. p. 6) that certain objections to stipulated testimony might be made in said briefs, counsel for de- [142] fendant at page 14 of defendant's reply brief objected to portions of this testimony and this objection was erroneously sustained by the court on page 12 of its conclusions of the court on the merits of the action. (2) One of the grounds urged by plaintiff and appellant for the granting of the motion to reopen was that the further evidence sought to be introduced related in part to defenses which the plaintiff with good cause did not anticipate, since they were not urged by the Commissioner of Internal Revenue in advance of trial or by the defendant at time of trial and were first advanced by the court itself after the trial had been concluded and the briefs of both parties submitted. Said briefs, together with the reporter's transcript, must therefore be reviewed by the Appellate Court to determine what defenses were urged by the defendant and what defenses were first advanced by the court itself after the trial had been concluded and the briefs of both parties submitted.

32. Stipulation continuing hearing on demurrer, filed herein on April 8, 1938.

33. Stipulation continuing hearing on demurrer, filed herein on June 13, 1938.

34. Stipulation continuing hearing on demurrer, filed herein on August 1, 1938.

35. Stipulation extending time to file defendant's brief, filed herein on May 28, 1940.

36. Stipulation extending time to file plaintiff's reply brief, filed herein on June 17, 1940.

37. Stipulation extending time to file plaintiff's reply brief, filed herein on July 11, 1940.

38. Memorandum of costs and disbursements, filed herein on August 8, 1941.

39. Affidavit of service by mail of cost bill, filed herein on August 8, 1941. [143]

40. Notice of appeal filed herein on November 3, 1941.

41. Stipulation in re record on appeal together with the order of the court dated November 29, 1941, extending the time to file the record on appeal and to docket this action, said stipulation and order being filed herein on November 29, 1941.

42. Bond for costs on appeal.

43. This designation of the contents of record on appeal.

Said transcript is to be prepared by the clerk of this court as required by law and the rules of this court and the Federal Rules of Civil Procedure, and to be filed in the office of the clerk of the Circuit Court of Appeals for the Ninth Circuit and this action there docketed on or before the 25th day of January, 1942, pursuant to the order of the

above entitled court made herein on the 29th day of November, 1941, extending the time within which to file the record on appeal and to docket this action.

Dated, this 14th day of January, 1942.

NEWLIN & ASHBURN

RAY J. COLEMAN

Attorneys for The B. F. Goodrich Company,
plaintiff and appellant

[Endorsed]: Received copy of the within Designation this 14 day of Jan. 1942. A. M. Jewell, Asst. U. S. Atty., Attorney for Deft. Filed Jan. 14, 1942.

[Endorsed]: Filed Jan. 14, 1942. [144]

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING
TIME TO FILE RECORD ON APPEAL
AND DOCKET ACTION

This court, upon the stipulation of counsel for plaintiff and defendant, having heretofore made its order herein extending the time to commence the preparation of the record on appeal to and including January 15, 1942, and extending the time to file the record on appeal and to docket this action in the Appellate Court to and including January 25, 1942; and

The plaintiff and appellant, The B. F. Goodrich

Company, a corporation, having filed with the clerk of this court on January 14, 1942, its designation of contents of record on appeal; and

The clerk of this court having advised counsel for plaintiff and appellant that he will not be able to prepare the transcript of the record on appeal in time to have the same filed in the Appellate Court before the expiration of the period for filing and docketing as extended by the aforementioned order of this court; [146]

Now, therefore, it is hereby stipulated by and between counsel for plaintiff and defendant above named, that the time of plaintiff and appellant for filing the record on appeal and for docketing this action in the Circuit Court of Appeals for the Ninth Circuit may be, by order of this court, extended to and including the 31st day of January, 1942.

Dated this 21 day of January, 1942.

NEWLIN & ASHBURN

RAY J. COLEMAN

Attorneys for Plaintiff and Appellant,
The B. F. Goodrich Company.

WILLIAM FLEET PALMER,

United States Attorney,

ARMOND MONROE JEWELL,
Assistant United States Attorney,

By ARMOND MONROE JEWELL
Attorneys for defendant and Respondent,
United States of America.

Upon the foregoing stipulation of counsel for plaintiff and defendant in the above entitled cause, and good cause appearing therefor,

It is hereby ordered that the time of the plaintiff and appellant for filing the record on appeal and for docketing this action in the Appellate Court be and it hereby is extended to and including the 31st day of January, 1942.

Dated: this 22nd day of January, 1942.

PAUL J. McCORMICK

United States District Judge.

[Endorsed]: Filed Jan. 22, 1942. [147]

[Title of District Court and Cause.]

ORDER THAT ORIGINAL PAPERS AND EXHIBITS BE SENT TO APPELLATE COURT

It being the opinion of this court that upon the appeal of this action to the Circuit Court of Appeals for the Ninth Circuit, it is desirable that certain original papers and exhibits should be sent to said Appellate Court in lieu of copies thereof,

Now, therefore, it is hereby ordered that the following listed original papers and exhibits, which are designated in items 27, 28 and 31 of appellant's designation of contents of record on appeal filed herein on January 14, 1942, be transmitted, in lieu of copies, by the clerk of this court to the clerk of the Circuit Court of Appeals for the Ninth Cir-

cuit to be by him safely kept and returned to the clerk of this court after the disposition of said appeal:

1. All of plaintiff's exhibits consisting of Exhibits "A", "B", "C", "D", "E", "F", "G", "H-1", "H-2", "H-3", "I", "I-1" and "J"; [149]

2. All of defendant's exhibits consisting of Exhibits Nos. 1, 2, 3 and 4;

3. Briefs as described in Item 31 of appellant's designation of contents of record on appeal filed herein on January 14, 1942.

Dated this 22nd day of January, 1942.

PAUL J. McCORMICK

United States District Judge.

[Endorsed]: Filed Jan. 22, 1942. [150]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 151 inclusive contain full, true and correct copies of Petition; Affidavit of Service of Petition by Mail; Affidavit of Service of Petition; Demurrer; Amendment to Demurrer; Amendment to Petition; Order for Amendment of Petition; Second Amendment to Demurrer; Notice

of Motion for Order Sustaining Demurrer; Order Overruling Demurrer; Answer to Petition; Affidavit of Service of Answer; First Amended Petition; Stipulation as to Filing First Amended Petition and re Answer thereto; Substitution of Attorneys filed Feb. 10, 1940; Stipulation of Facts; Order Submitting Cause; Conclusions of Court on Merits; Order for Findings and Judgment; Substitution of Attorneys filed Feb. 3, 1941; Notice of Motion to Reopen Case and Memorandum of Authorities and Three Affidavits Annexed thereto; Affidavit of Armond Monroe Jewell in Opposition to Motion to Reopen; Order Denying Motion to Reopen; Findings of Fact and Conclusions of Law; Judgment; Certificate of Clerk to Judgment Roll; Supplemental Stipulation re Exhibits; Three Stipulations Extending Time to File Briefs; Three Stipulations Continuing Hearing on Demurrer; Memorandum of Costs and Disbursements; Affidavit of Service of Cost Bill; Notice of Appeal; Bond for Costs on Appeal; Designation of Record on Appeal; Two Stipulations and Orders Extending Time to Docket Appeal; Order for Transmittal of Original Briefs and Exhibits, which together with the Reporter's Transcript of Testimony and Proceedings, the Brief of Plaintiff, Defendant's Reply Brief, Plaintiff's Reply Brief and the Original Exhibits transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk for

comparing, correcting and certifying the foregoing record amount to \$26.95, which amount has been paid to me by the Appellant.

Witness my hand and the seal of the said District Court this 29th day of January, A. D. 1942.

(Seal) R. S. ZIMMERMAN,
 Clerk,
By: EDMUND L. SMITH,
 Deputy.

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY

Appearances:

For the Plaintiff:

EUGENE H. BLANCHE, Esq.,
1117 Transamerica Building,
Los Angeles, California; and
F. C. LESLIE, Esq.,

For the Defendant:

BEN HARRISON,
United States Attorney; and
ARMOND MONROE JEWELL,
Assistant United States Attorney.

Los Angeles, California

Saturday, February 10, 1940—10:05 o'clock A. M.

The Court: Proceed.

The Clerk: No. 8138, The B. F. Goodrich Company versus the United States, for trial.

Mr. Jewell: Ready, your Honor.

Mr. Blanche: Ready.

The Court: Proceed.

Mr. Blanche: At this time, if the Court please, I wish to file a substitution of attorneys, substituting Eugene H. Blanche in lieu and instead of Messrs. Andrews, Blanche & Kline.

The Court: So ordered.

Mr. Blanche: Substitution has been served upon counsel for the Government.

I wish also at this time to associate in the trial of this matter, in behalf of The B. F. Goodrich Company, Mr. F. C. Leslie.

The Court: Mr. Leslie is a member of the bar of an outside jurisdiction——

Mr. Blanche: Mr. Leslie is a member of the bar of Ohio and Tennessee in the Sixth and Seventh Circuit and of the United States Supreme Court.

The Court: He is merely appearing in this case, and not permanently.

Mr. Blanche: Yes, he is. He did appear once before under the same conditions in an argument on a demurrer.

The Court: Very well.

Mr. Blanche: I may say that in this matter we have reduced practically every question to an agreed stipulation. There are one or two exceptions to that, and we will make that clear as we proceed.

It had been the thought of counsel that this matter be submitted on brief, probably 20, 20 and 10, and if your Honor wishes, at this time we are pre-

pared to make a brief opening statement of the situation, the contentions of the plaintiff and of the law involved.

The Court: I think it would be well to do that.

Mr. Blanche: Very well.

Mr. Leslie: If the Court please, this action is one for the recovery of additional manufacturers excise tax paid by the Pacific Goodrich Company in 1934. The original petition was filed in 1937, and a demurrer was filed on behalf of the Government. We argued that demurrer before your Honor, and that was overruled in October 1938.

The question raised by that demurrer was whether or not the tax sought to be recovered here was really an agriculture adjustment tax, namely, a floor stock or processing tax, rather than a manufacturing excise tax.

The question involved here is a construction of Section 9 (b) of the Agricultural Adjustment Act. Your Honor will probably recall the Revenue Act of 1932 assessed a manufacturers' excise tax on tires of $2\frac{1}{4}$ cents per pound.

In 1933, when the Agricultural Adjustment Act was passed, Section 9 (b) of that act provided for a credit to manufacturers of tires on the manufacturers' excise tax for the amount of cotton going into the tires upon which a processing tax had been paid.

The language of that Act is as follows:

“Provides: That any article upon which a manufacturers' sales tax is levied under the

authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight"—and that is true in the tires—"such manufacturers' sales tax shall be computed on the basis of the weight of such finished article, less the weight of the processed cotton contained therein on which a processing tax has been paid."

Your Honor will possibly also recall that the Agricultural Adjustment Act levied three types of taxes, or three divisions of taxes, all generally grouped under the processing tax.

First, was the tax which was to be paid on the processing of cotton after August 1, 1933, that being the effective date of the act.

Secondly, a floor stock tax which was to be paid at the same rate and on the same commodities but on the inventory on hand as of August 1, 1933.

Now, that second tax is commonly referred to by the Commissioner's office and by taxpayers as a floor stock tax.

The question involved is whether or not the words "processing tax," as used in the section which I just read to your Honor, includes floor stock tax as well as processing tax.

We contend that it must, otherwise there is such a discrimination there that Congress couldn't have intended anything other than that.

That is our contention.

Mr. Jewell: In addition to the contention referred to by counsel for the plaintiff, as to the

fact that the Government contends that the words "processing tax," giving that construction, do not include floor stock taxes, there is also another contention on the part of the Government, and that is that this is really an action for the recovery of taxes paid under the Agricultural Adjustment Act, and that the plaintiff has not conformed with the rules and regulations laid down by the statute in a suit for such a refund.

The Court: Proceed.

Mr. Blanche: If it please the Court, at this time I propose to offer a stipulation of facts in this matter which has been signed by counsel for the Government and counsel for the petitioner, the plaintiff.

By stipulation of counsel for the Government, there will be no question of a foundation raised. However, there may be raised, either at this time, or at the time of the filing of the brief, a question regarding, or questions regarding, the materiality of the facts stipulated to, the relevancy of the facts stipulated to and of the sufficiency of the proof made.

We appreciate that the latter may always be raised, but in order that there be no misunderstanding we make that statement.

The latter sufficiency of the proof made particularly pertains to the question of whether the tax was passed on to the consumer or whether the tax was subsequently billed by the consumer after the tax was assessed and levied.

It is our contention, of course, that inasmuch as the tax was not levied until some four months after the return, we were not apprised of it, we did not include it in the price of the commodity, and there is a statement to the effect that it was not covered with subsequent billing.

This stipulation, if the Court please, takes two forms. The first form is a stipulation as to ultimate facts, these having to do with items that are not denied in the first amended petition. The second takes the form that if two particular witnesses were called they would testify as set forth in the stipulation.

Is that a correct statement, Mr. Jewell——

Mr. Jewell: That is a correct statement.

The Court: I suppose that the stipulation that they would so testify is also made subject to the materiality and relevancy of that evidence.

Mr. Blanche: Yes, your Honor.

I do not believe it is in order to make this as an exhibit; I therefore offer it in evidence.

The Court: It may be filed.

Mr. Blanche: As a part of the pleadings——

The Court: Yes.

(The stipulation referred to was filed as a part of the pleadings.)

Mr. Blanche: We have a series of exhibits, if the Court please.

We will pass by Exhibit A for the reason that it arrived this morning from Akron and is being photostated. The original has not as yet been ex-

hibited to counsel for the Government, but it will be forwarded here as soon as we can photostat it. Therefore, I ask that the assignment dated June 30, 1934, from Pacific Goodrich Rubber Company to The B. F. Goodrich Company be introduced in evidence and marked as Plaintiff's Exhibit A. This will be furnished before adjournment of Court.

The Court: So ordered.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit A.")

PLAINTIFF'S EXHIBIT A

ASSIGNMENT

Know all men by these presents that Pacific Goodrich Rubber Company, a corporation duly organized and existing under the laws of the State of Delaware and having its general offices at Los Angeles, California, for good and valuable considerations enuring to its benefit and herewith acknowledged, does hereby assign, transfer and set over to The B. F. Goodrich Company, a New York corporation, all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have against any and all persons, firms or corporations, whether now due and payable or hereafter becoming due and payable including, but without limiting the generality of the foregoing, all bills or accounts receivable, outstanding contracts, insurance policies, bank

accounts, stocks, bonds, or other interest in other firms, companies and/or businesses, also all cash, trade marks, trade names, patents, leases, merchandise, raw materials, supplies and equipment.

To have and to hold the same unto the said The B. F. Goodrich Company, its successors and assigns forever.

Said Pacific Goodrich Rubber Company has nominated, constituted and appointed and by these presents does nominate, constitute and appoint said The B. F. Goodrich Company its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company to claim, demand payment and/or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof.

And said Pacific Goodrich Rubber Company does hereby agree that it will at any time or from time to time hereafter at the request of said The B. F. Goodrich Company make, do and execute all such further acts and instruments as may be necessary, convenient and proper to enable The B. F. Goodrich Company to recover said claims and amounts hereinabove referred to, title to which is hereby vested or intended to be vested in said The B. F. Goodrich Company.

In witness whereof, Pacific Goodrich Rubber Company has caused these presents to be signed in its name and on its behalf and its corporate seal

to be affixed hereto by its President and Secretary
as of the 30th day of June, 1934.

PACIFIC GOODRICH RUBBER
COMPANY

By J. D. TEW
President

Attest:

S. M. JETT
Secretary

State of Ohio,
County of Summit—ss.

Before me, a Notary Public in and for said county, personally appeared J. D. Tew, President and S. M. Jett, Secretary of Pacific Goodrich Rubber Company, the corporation which executed the foregoing instrument, who acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as such President and Secretary in behalf of said corporation and by authority of its board of directors; and that said instrument is their free act and deed individually and as such President and Secretary and the free and corporate act and deed of said The Pacific Goodrich Rubber Company.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal at Akron, Ohio, this 30th day of June, 1934.

ALBERTA H. TEWERS
Notary Public

My commission expires Dec. 15, 1935.

Mr. Blanche: I next offer in evidence an assignment dated August 14, 1935, from Pacific Goodrich Rubber Company to The B. F. Goodrich Company, the same being marked Exhibit B.

I may say, if the Court please, that copies of all of these exhibits, with the exception of Exhibit A which I have referred to, has already been furnished to, or examined by, counsel for the Government.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit B.")

PLAINTIFF'S EXHIBIT B

For value received, the undersigned, Pacific Goodrich Rubber Company, does hereby sell, assign and transfer unto The B. F. Goodrich Company, all claims, demands, choses in action or cause or causes of action of whatsoever kind and nature which it has or which may later accrue against all persons whomsoever, particularly its claim for refund of excise tax illegally paid to the United States Government from and after April 17, 1934, in the sum of \$16,450.39, or any one sum finally found to be due, together with interest thereon.

The assignor does by these presents, hereby nominate, constitute and appoint the said The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of the undersigned, to claim, demand payment and/or collect all such claims and amounts and

particularly, said claim for excise tax illegally paid to the United States Government, and otherwise to prosecute any and all proceedings at law or in equity therefor and to take such other action as may be necessary or appropriate to settle, compromise and/or collect said claim or claims, and further, to give effectual discharge of said claim or claims.

In witness whereof, the undersigned has hereunto attached its hand and seal this the 14th day of August, 1935.

PACIFIC GOODRICH RUBBER
COMPANY

By J. D. TEW

President

By S. M. JETT

Secretary

F. C. LESLIE

F. M. SEIFERT

State of Ohio,

County of Summit—ss.

Before me, a Notary Public in and for said county, personally appeared J. D. Tew, President, and S. M. Jett, Secretary of the Pacific Goodrich Rubber Company, the corporation which executed the foregoing instrument, who acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as such President and Secretary in behalf of said corporation and by authority of its

board of directors; and that said instrument is their free act and deed individually and as such President and Secretary and the free and corporate act and deed of said the Pacific Goodrich Rubber Company.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal at Akron, Ohio this 14th day of August, 1935.

ALBERTA M. TEWERS

Notary Public

My Commission expires Dec. 15, 1935.

Mr. Blanche: We next offer in evidence Plaintiff's Exhibit C, demand on Form 728 from the United States of America, addressed to Pacific Goodrich Rubber Company, for the sum of \$15,-880.64, plus interest of \$569.74.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit C.")

Sections 602-604, Rev. Act of 1907;
Sections 613-614, Rev. Act of 1902;
Section 600, Rev. Act of 1926.)

Sections 602-604, Inc. Rev. Act of 1937;
Sections 613-614, Inc. Rev. Act of 1937;
Section 601, Inc. Act of 1926.)

Sections 602-604, Inc. Rev. Act of 1937;
Sections 613-614, Inc. Rev. Act of 1937;
Section 601, Inc. Act of 1926.)

U & WERNECKE PRINTING OFFICE 1988

Mr. Blanche: We next offer in evidence, as Plaintiff's Exhibit D, claim for refund of Pacific Goodrich Rubber Company bearing date of August 19, 1935.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit D.")

PLAINTIFF'S EXHIBIT D

CLAIM

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Received Aug. 31, 1935. Collector Internal Revenue, Los Angeles, Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☒ Refund of Tax Illegally Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

State of Ohio,
County of Summit—ss.

Name of taxpayer or purchaser of stamps—Pacific Goodrich Rubber Company.

Business address—5400 E. Ninth St., Los Angeles, Calif.

Residence—

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Los Angeles, Calif.
2. Period (if for income tax, make separate form for each taxable year) from, 19...., to, 19....
3. Character of assessment or tax—Excise tax.
4. Amount of assessment, \$16,450.39; dates of payment April 17; July 27, 1934.
5. Date stamps were purchased from the Government.....
6. Amount to be refunded—\$16,450.39 plus interest.
7. Amount to be abated (not applicable to income or estate taxes)—\$
8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

Section 9 of the Agricultural Adjustment Act (H. R. 3835) provides: "That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of such finished article less the weight of the processed cotton contained therein, on which a processing tax has been paid." Under the provisions of this Section, the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the Commissioner's construction of Section 9 of the

Agricultural Adjustment Act to the effect that taxpayer is not entitled to a credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a proper construction of the Section 9 of the Agricultural Adjustment Act entitles taxpayer to a credit of the amount of tax and interest above claimed.

Signed PACIFIC GOODRICH RUBBER
COMPANY

By S. M. JETT

Assistant Secretary

(Seal)

Sworn to and subscribed before me this 19 day of
August, 1935.

RUTH REES,

Notary Public

My Commission Expires Aug. 27, 1935.

(See Instructions on Reverse Side)

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered	List	Year	Month	ACCOUNT NO. OR		Amount assessed	PAID, ABATED, OR CREDITED		Pd. Ab. Cr.
				Page	Line		Date	Amount	
1917-18	155	1917	1			\$ 1,100.00	1917	\$ 1,100.00	1917
Total, \$									

I certify that the records of this office show the following facts as to the purchase of stamps:

TO WHOM SOLD OR ISSUED	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp, state	
						Serial number	Period commencing
Previous Claim See Cl. No. _____							

REFUND

Nathaniel
Collector of Internal Revenue

6th

Cal.

COMMITTEE ON CLAIMS

Examine by _____
Approved by _____
Chief of Division

Amount claimed \$ 16,450.39

Amount allowed \$

Amount rejected \$ 16,450.39

INSTRUCTIONS

- The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.
- The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney, agent, or other fiduciary, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.
- If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.
- Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of an officer having authority to sign for the corporation.

9-2

Mr. Blanche: After the stipulation was prepared, your Honor, there were some changes in the letters of the exhibits, and possibly we may not be exactly correct in them, but we will furnish the Court, in the brief to be filed, a correct designation of those exhibits.

We next offer in evidence, as Plaintiff's Exhibit E, amended claim for refund of Pacific Goodrich Rubber Company, in the amount of \$16,450.39, being the same amount as that demanded in the original claim for refund.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit E.")

PLAINTIFF'S EXHIBIT E

AMENDED CLAIM

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Received Apr. 21, 1936. Coll. Int. Rev., Los Angeles, Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☒ Refund of Tax Illegally Collected.
☐ Refund of Amount Paid for Stamps Unused,
or Used in Error or Excess.
☐ Abatement of Tax Assessed (not applicable
to estate or income taxes).

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps—Pacific Goodrich Rubber Company.

Business address—5400 E. Ninth Street, Los Angeles, California.

Residence—

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Los Angeles, California.
2. Period (if for income tax, make separate form for each taxable year) from, 19....., to, 19.....

3. Character of assessment or tax—excise tax.
4. Amount of assessment, \$16,450.39; dates of payment April 17; July 27, 1934.
5. Date stamps were purchased from the Government
6. Amount to be refunded \$16,450.39 plus interest.
7. Amount to be abated (not applicable to income or estate taxes) \$
8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

During the period from August 1, 1933 through September 30, 1933, the taxpayer manufactured and sold tires which contained some 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue for the Sixth District of Calif., a so-called floor tax levied by Section 16 of the Agricultural Adjustment Act, at the rate of .044184 per pound. That in computing the excise tax levied by Section 602 of the Revenue Act of 1932 upon tires manufactured and sold subsequent to August 1, 1933, taxpayer took a deduction from said excise tax in accordance with the provisions of Section 9 of the Agricultural Adjustment Act, that is, it arrived at excise tax due by deducting from the weight of the tires manufactured and sold after August 1, 1933, the weight of processed cotton in said tires

upon which a so-called floor tax had been paid under Section 16 of the Agricultural Adjustment Act. Upon an examination of taxpayer's records, the Commissioner of Internal Revenue assessed the tax above described against the taxpayer upon the theory that the provisions of Section 9 of the Agricultural Adjustment Act did not apply to articles upon which a floor stock tax had been paid under the provisions of Section 16 of said Act. The taxpayer did not include the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. Neither did it collect the amount of said tax from the persons to whom the articles in question were sold. That a proper interpretation of Section 9 of the Agricultural Adjustment Act entitles the taxpayer to the credit taken by it upon its excise tax returns by reason of the payment of the so-called floor tax. The taxpayer insists that the words "processing tax" as used in Section 9 of the Agricultural Adjustment Act mean any and all taxes levied under and by the general scheme of the processing taxes and that "processing taxes" as used throughout the Agricultural Adjustment Act mean not only the tax which accrued upon the processing of the article in question but the so-called floor tax levied in order to prevent processors from escaping or avoiding the taxes levied under said Agricultural Adjustment Act, and that Congress intended that the credit granted under said Section 9 of the Agri-

cultural Adjustment Act should apply wherever any processing or floor stock tax had been paid.

Signed PACIFIC GOODRICH RUBBER
COMPANY

By S. M. JETT

(Seal)

Sworn to and subscribed before me this 30th day of March, 1936.

ALBERTA M. TEWERS

Notary Public

(See Instructions on Reverse Side)

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered	List	Year	Month	ACCOUNT No. On		Amount assessed	PAID, ABAYED, OR CREDITED		By Ass. Off.
				Page	Line		Date	Amount	
Dec 33 addl	Misc	1934	Apr	1052	1	\$ 15.380	64 4/19/34	\$ 15.380	Pa
						A 369	75 7/30/34	569.75	P1
Total, \$							Total, \$		

I certify that the records of this office show the following facts as to the purchase of stamps:

To Whom Sold or Issued	Kind	Number	Designation	Date of sale or issue	Amount	Disposition of stamp	
						Serial number	Place of cancellation
Previous Claim							
See Cl. No. R-2,753							
R-31,017							
Collector of Internal Revenue				District			

38676

Examined by: *Am*
Approved by: *Am*
Chief of Division

Amount claimed \$ 1640.39
Amount allowed \$.
Amount rejected \$ 1450.39

COMMITTEE ON CLAIMS

INSTRUCTIONS

- The claim must set forth in detail and under oath each ground on which it is made, and facts sufficient to apprise the Committee of the exact basis thereof.
- The claim should be sworn to by the taxpayer, if possible. If, however, it is necessary to have the claim executed by a legal representative, on behalf of the taxpayer, an authenticated copy of the instrument specifically authorizing such agent or attorney, together with a statement on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by the collector of internal revenue.
- If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, married, or minor taxpayer, the letters testamentary, letters of administration, or other evidence must be annexed to the claim. If the claim is filed by an executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence of the authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.
- Where the taxpayer is a corporation, the claim should be signed with the corporate name, followed by the signature of an officer having authority to sign for the corporation.

Mr. Blanche: We next offer in evidence, as Plaintiff's Exhibit F, claim for refund dated August 19, 1935, filed on behalf of and by The B. F. Goodrich Company in the same amount as that specified in the Exhibits C and D, namely, \$16,450.39.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit F.")

PLAINTIFF'S EXHIBIT F

CLAIM

To be filed with the Collector where assessment
was made or tax paid

Received Aug. 31, 1935. Coll. Int. Rev. Los Angeles, Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[x] Refund of tax illegally collected.

[] Refund of amount paid for stamps unused, or used in error or excess.

[] Abatement of tax assessed (not applicable to estate or income taxes).

State of Ohio,

County of Summit—ss.

Name of taxpayer or purchaser of stamps—The
B. F. Goodrich Company.

Business address—5400 E. Ninth Street, Los Angeles, California.

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on

behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Los Angeles, California.
2. Period (if for income tax, make separate form for each taxable year) from, 19....., to, 19.....
3. Character of assessment or tax—excise tax.
4. Amount of assessment, \$16,450.39; dates of payment April 17; July 27, 1934.
5. Date stamps were purchased from the Government.....
6. Amount to be refunded—\$16,450.39 plus interest
7. Amount to be abated (not applicable to income or estate taxes)—\$.....
8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

Section 9 of the Agricultural Adjustment Act (H.R. 3835) provides: "That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturer's sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of such finished article less the weight of the processed cotton contained therein, on which a processing tax has been paid." Under the provisions of this section, the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the

Commissioner's construction of Section 9 of the Agricultural Adjustment Act to the effect that taxpayer is not entitled to a credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a proper construction of the Section 9 of the Agricultural Adjustment Act entitles taxpayer to a credit of the amount of tax and interest above claimed.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company, a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company, to ask, demand or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof.

Assignment

Know all men by these presents that Pacific Goodrich Rubber Company, a corporation duly or-

ganized and existing under the laws of the State of Delaware and having its general offices at Los Angeles, California, for good and valuable considerations enuring to its benefit and herewith acknowledged, does hereby assign, transfer and set over to The B. F. Goodrich Company, a New York corporation, all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have against any and all persons, firms or corporations, whether now due and payable or hereafter becoming due and payable including, but without limiting the generality of the foregoing, all bills or accounts receivable, outstanding contracts, insurance policies, bank accounts, stocks, bonds, or other interest in other firms, companies and/or businesses, also all cash, trade marks, trade names, patents, leases, merchandise, raw materials, supplies and equipment.

To have and to hold the same unto the said The B. F. Goodrich Company, its successors and assigns forever.

Said Pacific Goodrich Rubber Company has nominated, constituted and appointed and by these presents does nominate, constitute and appoint said The B. F. Goodrich Company its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company to claim, demand payment and/or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof.

And said Pacific Goodrich Rubber Company does

hereby agree that it will at any time or from time to time hereafter at the request of said The B. F. Goodrich Company make, do and execute all such further acts and instruments as may be necessary, convenient and proper to enable The B. F. Goodrich Company to recover said claims and amounts hereinabove referred to, title to which is hereby vested or intended to be vested in said The B. F. Goodrich Company.

In witness whereof, Pacific Goodrich Rubber Company has caused these presents to be signed in its name and on its behalf and its corporate seal to be affixed hereto by its President and Secretary as of the 30th day of June, 1934.

PACIFIC GOODRICH RUBBER
COMPANY

By (s) J. D. TEW
President

Attest:

(s) S. M. JETT
Secretary

GTK

(Signed) THE B. F. GOODRICH COMPANY
By S. M. JETT
Secretary

(Seal)

Sworn to and subscribed before me this 19 day
of August, 1935.

(Seal) RUTH REES

My Commission expires Aug. 27, 1935

(See Instructions on Reverse Side)

CERTIFICATE

certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered	Pacific Goodrich Rubber Co.				Amount assessed	PAID, ABATED, OR CREDITED		Paid Ab. Cr.
	List	Year	Month	Page Line		Date	Amount	
1. tax 2. Dec. 1933 Interest	Misc.	1934	Apr.	1052 1	\$ 15,880 64 569 75	4/19/34 7/30/34	\$ 15,880 64 569. 75	Paid Paid
Refund of excess interest of \$62.52 was allowed April 12, 1935. REF: 7921								
The above assessment evidently represents rejected credits.								
Total, \$					\$	Total, \$		

certify that the records of this office show the following facts as to the purchase of stamps:

To Whom Sold or Issued	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp, state	
						Serial number	Period commencing--
					\$		

Collector of Internal Revenue.

(District)

COMMITTEE ON CLAIMS

examined by--	Amount claimed \$
approved by--	Amount allowed \$
Verbal Return	Amount rejected \$

INSTRUCTIONS

The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Committee of the exact basis thereof.

The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return, and a refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not be annexed to the claim, provided a statement is made on the claim showing that the return was filed by the same fiduciary and that the claim is filed by the same fiduciary.

Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign the claim.

7-2

Mr. Blanche: We next offer in evidence, as Plaintiff's Exhibit G, amended claim of refund—I may say, if your Honor please, that these claims were specifically pleaded in two particulars as far as The B. F. Goodrich Company is concerned in the petition, and denied for lack of information wholly. This bears date of April 17, 1938.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit G.")

PLAINTIFF'S EXHIBIT G

AMENDED CLAIM

To be filed with the Collector where assessment
was made or tax paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- [] Refund of tax illegally collected.
- [] Refund of amount paid for stamps unused, or used in error or excess.
- [] Abatement or tax assessed (not applicable to estate or income taxes).

State of Ohio,

County of Summit—ss.

Name of taxpayer or purchaser of stamps—The
B. F. Goodrich Company.

Business address—5400 E. Ninth Street, Los Angeles, Calif.

Residence

The deponent, being duly sworn according to law,

deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—
Los Angeles, California.
2. Period (if for income tax, make separate form for each taxable year) from, 19....., to, 19.....
3. Character of assessment or tax—excise tax.
4. Amount of assessment, \$16,450.39; dates of payment April 17, July 27, 1934.
5. Date stamps were purchased from the Government.....
6. Amount to be refunded—\$16,450.39 plus interest
7. Amount to be abated (not applicable to income or estate taxes)—\$.....
8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

During the period from August 1, 1933 through September 30, 1933, the taxpayer manufactured and sold tires which contained some 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue for the 6th District of California, a so-called floor tax levied by Section 16 of the Agricultural Adjustment Act, at the rate of .044184 per pound. That in computing the excise tax levied by Section

602 of the Revenue Act of 1932 upon tires manufactured and sold subsequent to August 1, 1933, taxpayer took a deduction from said excise tax in accordance with the provisions of Section 9 of the Agricultural Adjustment Act, that is, it arrived at excise tax due by deducting from the weight of the tires manufactured and sold after August 1, 1933, the weight of processed cotton in said tires, upon which a so-called floor tax had been paid under Section 16 of the Agricultural Adjustment Act. Upon an examination of taxpayer's records, the Commissioner of Internal Revenue assessed the tax above described against the taxpayer upon the theory that the provisions of Section 9 of the Agricultural Adjustment Act did not apply to articles upon which a floor stock tax had been paid under the provisions of Section 16 of said Act. The taxpayer did not include the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. Neither did it collect the amount of said tax from the persons to whom the articles in question were sold. That a proper interpretation of Section 9 of the Agricultural Adjustment Act entitles the taxpayer to the credit taken by it upon its excise tax returns by reason of the payment of the so-called floor tax. The taxpayer insists that the words "processing tax" as used in Section 9 of the Agricultural Adjustment Act mean any and all taxes levied under and by the general scheme of the processing taxes and that

“processing taxes” as used throughout the Agricultural Adjustment Act mean not only the tax which accrued upon the processing of the article in question but the so-called floor tax levied in order to prevent processors from escaping or avoiding the taxes levied under said Agricultural Adjustment Act, and that Congress intended that the credit granted under said Section 9 of the Agricultural Adjustment Act should apply wherever any processing or floor stock tax had been paid.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company, a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company to ask, demand, or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof. -

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

[Form not filled in]

I certify that the records of this office show the following facts as to the purchase of stamps:

[Form not filled in]

.....
Collector of Internal Revenue

.....
(District)

Committee on Claims

Amount claimed \$.....
Amount allowed \$.....
Amount rejected \$.....

Instructions

1. The claim must be set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

Mr. Blanche: We next offer, as Plaintiff's Exhibit H, three letters. It is suggested that these be offered as one exhibit and marked H-1, H-2 and H-3.

The Court: So ordered.

The first thereof being addressed to The B. F. Goodrich Company and signed by Guy T. Helvering, Commissioner, by D. S. Bliss, Deputy Commissioner; H-2 being addressed to the [9] same named

corporation and signed by the same named persons; H-3 is a letter addressed to Pacific Goodrich Rubber Company, and signed by the same named persons as those heretofore noted.

(The documents referred to *was* received in evidence and marked "Plaintiff's Exhibits H-1, H-2 and H-3.")

PLAINTIFF'S EXHIBIT H-1

TREASURY DEPARTMENT

Washington

Office of

Commissioner of Internal Revenue

Address Reply to

Commissioner of Internal Revenue

and Refer to

MT:ST:DM

Cl. S-38677

[Date illegible]

The B. F. Goodrich Company,
5400 E. Ninth Street,
Los Angeles, California.

Gentlemen:

Reference is made to your claim for refund of \$16,450.39, representing tax and interest paid by the Pacific Goodrich Rubber Company, 5400 E. 9th Street, Los Angeles, California, under the provisions of section 602 of the Revenue Act of 1932.

It is stated that you are entitled to the refund of the above tax since the Pacific Goodrich Rubber Company sold, assigned, transferred and set over to you all its rights and claims. It is contended that the Pacific Goodrich Rubber Company erroneously paid manufacturers' excise tax in the amount claimed for the reason that floor tax was paid on the cotton content of the tires in question.

There is on file in this office a claim filed by the Pacific Goodrich Rubber Company for refund of the above tax, based on the same contentions. This claim is therefore a duplicate claim and is rejected in full.

Respectfully,

GUY T. HELVERING,

Commissioner.

By: D. S. BLISS,

Deputy Commissioner.

cc-Los Angeles, California.

PLAINTIFF'S EXHIBIT H-2

TREASURY DEPARTMENT

Washington

Office of

Commissioner of Internal Revenue

Address Reply to

Commissioner of Internal Revenue

and Refer to

MT:ST:DM

Cl. S-38676

May 22, 1936

Pacific Goodrich Rubber Company,

5400 E. Ninth Street,

Los Angeles, California.

Gentlemen:

Reference is made to your claim for refund of \$16,450.39, representing tax paid under the provisions of section 602 of the Revenue Act of 1932, for the months of November and December 1933.

The claim is based on the contention that a proper interpretation of section 9(a) of the Agricultural Adjustment Act entitles you to the credit for floor tax paid on the cotton contents of tires in computing manufacturer's excise tax due thereon. You insist that the words "processing tax" as used in this section of the Act means any and all taxes levied under the Agricultural Adjustment Act.

Under date of April 8, 1936 this office rejected your claim No. S-31017 for refund of the amount

of tax involved in this claim and based on the same contentions.

Since you have failed to furnish any new and material evidence in support of the claim, the previous action of this office is sustained and the present claim rejected in full.

Respectfully,

GUY T. HELVERING,

Commissioner.

By: D. S. BLISS,

Deputy Commissioner.

cc-Los Angeles, California.

PLAINTIFF'S EXHIBIT H-3

TREASURY DEPARTMENT

Washington

Office of

Commissioner of Internal Revenue

Address Reply to

Commissioner of Internal Revenue

and Refer to

MT:ST:DM

Cls: S-38676 and 38677

June 23, 1936

The B. F. Goodrich Company,

Akron, Ohio.

Attention: Mr. F. C. Leslie.

Gentlemen:

Reference is made to your letter of June 8, 1936,

requesting to be advised as to whether the claims filed by Pacific Goodrich Rubber Company, Los Angeles, California, and the B. F. Goodrich Company, Los Angeles, California, both in the amount of \$16,450.39, which were rejected in office letters dated May 22, 1936, were the claims filed with the Collector of Internal Revenue, Los Angeles, California, under date of April 17, 1936.

You are advised that the receiving stamps on the above claims indicate that they were received in the office of the Collector of Internal Revenue, Los Angeles, California, on April 21, 1936.

Respectfully,

D. S. BLISS,

Deputy Commissioner.

Mr. Blanche: We offer as Plaintiff's next exhibit, I, copy of the minutes of a special meeting of the Board of Directors of Pacific Goodrich Rubber Company, held on July 6, 1934;

We also offer as No. 1 of the last named exhibit, minutes of a special meeting of the stockholders of Pacific Goodrich Rubber Company, likewise held on Friday, July 6, 1934.

(The documents referred to *was* received in evidence and marked "Plaintiff's Exhibits I, and I-1.")

PLAINTIFF'S EXHIBIT I

The undersigned, S. M. Jett, Secretary of Pacific Goodrich Rubber Company, a Delaware Corporation, hereby certifies that the minutes attached hereto are true and correct copies of minutes of the meeting of the stockholders of that company held on July 6, 1934, and of the meetings of the Board of Directors held on July 6 and August 24, 1934, all as appears by the records of the company in his official custody.

In witness whereof, the undersigned has set his hand and affixed the seal of the corporation, this 19th day of January, 1940.

S. M. JETT

Secretary

Pacific Goodrich Rubber Company

SPECIAL MEETING OF THE BOARD OF
DIRECTORS OF PACIFIC GOODRICH
RUBBER COMPANY

Minutes of a special meeting of the Board of Directors of Pacific Goodrich Rubber Company, a Delaware corporation, held at 500 South Main Street, Akron, Ohio, Friday July 6, 1934.

There were present Messrs. J. D. Tew, S. B. Robertson, T. B. Tomkinson, S. M. Jett, representing a majority of the Board of Directors and thereby constituting a quorum for the transaction of business.

Mr. Tew, President, presided as Chairman of the meeting and Mr. Jett, Secretary, kept the minutes. The Chairman ordered the Secretary to file with the minutes of the meeting a waiver of notice and consent signed by all of the directors of the corporation.

The Chairman then announced that the meeting had been called for the purpose of formally voting on a proposal to dissolve the corporation, and upon favorable action taken thereon at this meeting, to recommend to the stockholders the dissolution of the corporation. He stated that, as known to all of the directors present, the possession of all property and assets of the corporation had been delivered over to The B. F. Goodrich Company as the owner of all of the stock of the corporation at the close of business on June 30, 1934, but that this meeting had been called to ratify such action on the part of the management according to law.

Thereupon, on motion duly made and seconded, it was by unanimous vote

Resolved. that in the judgment of this Board of Directors it is advisable and most for the benefit of Pacific Goodrich Rubber Company that said corporation should be dissolved, and to that end and as required by law, that a meeting of the stockholders of said corporation be held at 500 South Main Street, Akron, Ohio, on the 6th day of July, 1934, at 2 o'clock in the

afternoon to take action upon this resolution, and

Be it further resolved, that this Board of Directors does hereby ratify the action taken by the management of this corporation in transferring to and delivering over possession to The B. F. Goodrich Company of all of the assets of this corporation at the close of business on June 30, 1934, as a distribution in kind to the stockholders of all the assets of this corporation, and hereby recommends the ratification and approval by the stockholders of such action on the part of the management of the corporation, and

Be it further resolved, that the Secretary of this corporation be and he hereby is directed to cause notice of the adoption of this resolution to be given to each stockholder of the corporation.

There being no further business, the meeting was on vote adjourned.

PLAINTIFF'S EXHIBIT I-1

SPECIAL MEETING OF THE STOCKHOLDERS OF PACIFIC GOODRICH RUBBER COMPANY.

Minutes of a special meeting of the stockholders of Pacific Goodrich Rubber Company, a Delaware corporation, held at 500 South Main Street, Akron, Ohio, on Friday, July 6, 1934, at 2 o'clock in the afternoon. There were present either in person or by proxy all of the stockholders of the corporation.

Mr. Tew, President, presided as Chairman of the meeting and Mr. Jett, Secretary, kept the minutes. The Chairman ordered the Secretary to file with the minutes of the meeting a Waiver of Notice and Consent signed by all of the stockholders.

The Chairman then announced that the meeting had been called for the purposes set forth in the aforesaid Waiver of Notice and Consent. Thereupon, on motion duly made and seconded, the following resolution was unanimously adopted:

Whereas, it is in the judgment of the stockholders of this corporation advisable and most for the benefit of the corporation that the corporation be dissolved, as recommended by resolution of its Board of Directors at a meeting duly called and held,

Now, therefore, be it resolved that the proper officers of the corporation are hereby authorized and directed to obtain the execution by all of the stockholders of the corporation of a cer-

tificate of dissolution by unanimous consent, and to file said certificate with the Secretary of State of the State of Delaware.

The Chairman then announced that the corporation, acting through its officers, had transferred and delivered over to The B. F. Goodrich Company at the close of business on June 30, 1934, all of its assets in anticipation of the immediate dissolution of the company. Thereupon, on motion duly made and seconded, it was by unanimous vote

Resolved that the stockholders of this corporation do hereby unanimously ratify and approve the action of the management of the corporation in transferring and delivering over to The B. F. Goodrich Company at the close of business on June 30, 1934, possession and control of all of the property and assets of the corporation as a distribution in kind of all of the assets of the corporation to its stockholders, all of its issued and outstanding stock being owned and/or controlled by said The B. F. Goodrich Company, and

Be it further resolved that the President or a Vice President and the Secretary or an Assistant Secretary be and they hereby are authorized to execute in the name and on behalf of the corporation a good and sufficient deed of conveyance of all of the real estate of this corporation to The B. F. Goodrich Company, and to perform and execute all such further

acts and assignments of bills and accounts receivable or other instruments as may be necessary or convenient to vest in The B. F. Goodrich Company full and complete title to all of the assets of this corporation.

The Secretary then called to the attention of the meeting the fact that the company should be withdrawn from the State of California, so as to prevent the incurring of further liability for taxes in that state. Thereupon, on motion duly made and seconded, it was by unanimous vote

Resolved that the proper officers of the corporation are hereby authorized and directed to execute and file with the proper official or officials of the State of California a certificate of withdrawal or such other instruments as may be necessary to effectuate the withdrawal of this corporation from the State of California.

There being no further business, the meeting on vote adjourned.

SPECIAL MEETING OF THE BOARD OF DIRECTORS OF PACIFIC GOODRICH RUBBER COMPANY

Minutes of a special meeting of the Board of Directors of Pacific Goodrich Rubber Company, a Delaware corporation, held at 500 South Main Street, Akron, Ohio, Friday, August 24, 1934.

There were present Messrs. J. D. Tew, S. B. Robertson, T. B. Tomkinson, and S. M. Jett, representing a majority of the Board of Directors and therefore constituting a quorum for the transacting of business.

Mr. Tew, President, presided as Chairman of the meeting, and Mr. Jett, Secretary kept the minutes. The Chairman ordered the Secretary to file with the minutes of the meeting a waiver of notice and consent signed by all the directors of the corporation.

The Chairman then announced that the meeting had been called for the purpose of formally ratifying the execution and delivery of a certain assignment by the corporation, dated June 30, 1934, to The B. F. Goodrich Company and for the further purpose of authorizing the execution of deeds of conveyance and such other instruments as may be necessary to vest in The B. F. Goodrich Company full and complete title to all real property owned by the corporation.

Thereupon, on motion duly made and seconded, it was by unanimous vote

Resolved, that the Directors of this corporation do hereby unanimously ratify and approve the execution and delivery by the President and Secretary of the corporation of a certain assignment, dated June 30, 1934, transferring and setting over unto The B. F. Goodrich Company all rights, claims, and choses in action of every nature and description which the corporation now has or shall have against any and

all persons, firms or corporation, whether now due and payable or hereafter becoming due and payable including, but without limiting the generality of the foregoing, all bills or accounts receivable, outstanding contracts, insurance policies, bank accounts, stocks, bonds, or other interest in other firms, companies and/or businesses, also all cash, trade marks, trade names, patents, leases, merchandise, raw materials, supplies and equipment, and

Be it further resolved, that the President or a Vice President and the Secretary or an Assistant Secretary be and they hereby are authorized to execute in the name and on behalf of the corporation a good and sufficient deed of conveyance of all of the real estate of this corporation to The B. F. Goodrich Company, and to perform and execute all such further acts as may be necessary or convenient to vest in The B. F. Goodrich Company full and complete title to all of the real estate of this corporation.

There being no further business, the meeting on vote adjourned.

Mr. Blanche: We offer as Plaintiff's next exhibit, J, certificate of the Secretary of State of Delaware certifying the dissolution, under date of December 21, 1934, of Pacific Goodrich Rubber Company.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit J.")

PLAINTIFF'S EXHIBIT J

State of Delaware
Office of Secretary of State

CERTIFICATE OF DISSOLUTION

To All Whom These Presents May Come, Greeting:

Whereas, It appears to my satisfaction by duly authenticated record of the proceedings for the voluntary dissolution thereof, by the consent of all the stockholders deposited in my office, the Pacific Goodrich Rubber Company a corporation of this State whose principal office is situated at No. 100 West 10th Street in the city of Wilmington, County of New Castle State of Delaware The Corporation Trust Company being agent therein, and in charge thereof, upon whom process may be served, has complied with the requirements of the Corporation Laws of the State of Delaware, as contained in 1915. Section 1, to 2101 Section 187, Chapter 65, of the Revised Statutes of 1915, as amended, preliminary to the issuing of this Certificate of Dissolution.

Now, therefore, I Walter Dent Smith Secretary of State of the State of Delaware, do hereby certify that the said corporation did on the twenty-first day of December A. D. 1934 file in the office a duly executed and attested consent, in writing, to the dissolution of said corporation executed by all the stockholders thereof, which said consent and the records of the proceedings aforesaid, are now on file in my said office as provided by law.

In testimony whereof, I have hereunto set my hand and official seal, at Dover this twenty-first

day of December in the year of our Lord one thousand nine hundred and thirty-four.

(Seal)

WALTER DENT SMITH

Secretary of State

State of Delaware,

New Castle County—ss.

Recorded in the Recorder's Office at Wilmington, in Corporation Record W Vol. 42 Page 101 &c., the 23rd day of January A. D., 1935.

Witness my hand and official seal.

ALBERT STETSER

Recorder,

By EUGENE N. SCARBOROUGH

Deputy Recorder.

Mr. Blanche: If the Court please, that concludes the exhibits to be introduced by Plaintiff with the exception of Exhibit A, which is to be supplied [10] when the messenger arrives with the photostated copy.

The Court: With that, the Court understands that the Plaintiff rests now——

Mr. Blanche: Yes, your Honor.

Mr. Jewell: On behalf of the Government, I would like to offer into evidence a copy of the manufacturers' excise tax return for the month of November, filed by the Pacific Goodrich Rubber Company, Los Angeles, California.

The Clerk: Government's Exhibit 1.

(The document referred to was received in evidence and marked "Government's Exhibit No. 1.")

Form 796—Rev. Sept., 1932
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

1527
MANUFACTURER'S EXCISE TAXES

GOVERNMENT'S EXHIBIT

CHARACTER OF TAX	RATE	AMOUNT OF TAX
(1) Tires	2 1/2 cts. per lb.	16 339 78
(2) Inner tubes	4 cts. per lb.	
(3) Toilet preparations (perfumes, cosmetics, etc.)	10% of sale price	
(4) Toilet preparations (tooth pastes, toilet soaps, etc.)	10% of sale price	
(5) Articles made of fur	10% of sale price	
(6) Jewelry	10% of sale price	
(7) Auto truck chassis and bodies	3% of sale price	
(8) Other auto chassis and bodies and motor cycles	3% of sale price	
(9) Parts and accessories	3% of sale price	
(10) Radio receiving sets, phonograph records, etc.	3% of sale price	
(11) Sporting goods	10% of sale price	
(12) Firearms, shells, and cartridges	2% of sale price	
(13) Cameras and lenses	10% of sale price	
(14) Candy	2% of sale price	
(15) Chewing gum	2% of sale price	
(16) Pistols and revolvers	10% of sale price	

AMOUNT OF TAX	
Total tax due	\$ 21 077 81
Less overpayment for 1932	
DEPOSIT 1933	\$ 21 077 81
Penalty, 25 per cent.	
Interest	
Less Total refund due 1933	\$ 21 077 81

I swear (or affirm) NOV foregoing 10% of the amount of tax due for the month of 1933, and that the amount deducted for overpayment is correct and allowable by law.

Signed PACIFIC GOODRICH RUBBER COMPANY

(State whether individual owner of business, member of firm, or if officer of corporation or duly authorized manager or agent, give title)

Sworn and subscribed before me this 24th day of April, 1933

(Notary or Witness) (See paragraph 3 of instructions) (Title) or (Witness)

IMPORTANT.—Return with remittance should be sent to the Collector of Internal Revenue for your district and NOT to the Commissioner of Internal Revenue at Washington, D. C. (See instructions, par. 2, on reverse of DUPLICATE form.) If you have nothing to report, make notation in this space on this form and return to the Collector of Internal Revenue. If final return is filed, the return should be marked "FINAL RETURN."

Name
No. and Street
City and State
PACIFIC GOODRICH RUBBER CO
5400 E 9TH ST
LOS ANGELES CALIF 10835

ORIGINAL RETURN.—This form must be returned to the Collector of Internal Revenue.

INSTRUCTIONS

(For full instructions see Regulations 46, June, 1932, and Regulations 67, revised Oct., 1936)

1. LA W.—The Revenue Act of 1932 imposes taxes upon the following articles sold by the manufacturer, producer, or importer:
- | Section | Description | Rate |
|---------|--|--------------------|
| 602 | (a) Tires wholly or in part of rubber (exclusive of metal rims and rim bases)—on total weight | 2 1/2 cts. per lb. |
| 603 | (a) Inner tubes (for tires) wholly or in part of rubber—on total weight | 4 cts. per lb. |
| 604 | (a) Perfumes, essences, extracts, toilet waters, cosmetics, petroleum kelles, hair oils, pomades, hair dressings, hair restoratives, hair dyes, aromatic cachous, toilet powders, and any similar substance, article, or preparation, by whatsoever name known or distinguished | 10% of sale price. |
| 605 | (b) Tooth and mouth washes, dentifrices, tooth pastes, and toilet soaps | 5% of sale price. |
| 606 | (a) Articles commonly or commercially known as jewelry, whether real or imitation; pearls, precious and semiprecious stones, and imitations thereof; articles made of, or ornamented, mounted, or fitted, with precious metals or imitations thereof or ivory (not including surgical instruments or silver-plated ware, or frames or mountings for spectacles or eyeglasses); watches; clocks; parts for watches or clocks sold for more than 9 cents each; opera glasses; longglasses; marine glasses; field glasses; and binoculars | 10% of sale price. |
| 607 | (a) No tax is imposed on any article used for religious purposes or on any article (other than watch parts or clock parts) sold for less than \$3.00 | |
| 608 | (a) Auto truck chassis and auto truck bodies (including in both cases parts or accessories thereof sold on or in connection therewith or with the sale thereof) | 3% of sale price. |
| 609 | (b) Other auto chassis and bodies and motor cycles (including in each case parts or accessories thereof sold on or in connection therewith or with the sale thereof), except tractors | 3% of sale price. |
| 610 | (a) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b) | 3% of sale price. |
| 611 | (b) Chassis, cabinets, tubes, reproducing units, power packs, and phonograph mechanisms, suitable for use in connection with or as part of radio receiving sets or combination radio and phonograph sets (including in each case parts or accessories thereof sold on or in connection therewith or with the sale thereof), and records for phonographs | 3% of sale price. |
| 612 | (a) Household type refrigerators (for single or multiple cabinet installations) operated with electricity, gas, kerosene, or other means (including parts or accessories thereof, sold on or in connection therewith or with the sale thereof) | 5% of sale price. |
| 613 | (b) Cabinets, compressors, condensers, expansion units, absorbers, and controls for, or suitable for use as part of or with, any of the articles enumerated in subsection (a) (including in each case parts or accessories for such refrigerator components sold on or in connection therewith or with the sale thereof) except when sold as component parts of complete refrigerators or refrigerating or cooling apparatus | 5% of sale price. |
| 614 | (a) Firearms, shells, and cartridges | 2% of sale price. |
| 615 | (b) Sporting goods, games, etc. | 10% of sale price. |
| 616 | (a) Firearms, shells, and cartridges | 2% of sale price. |
| 617 | (b) The United States, any political subdivision thereof, or the District of Columbia or (b) to pistols and revolvers | 10% of sale price. |

Mr. Jewell: I also offer into evidence on behalf of the Government, copy of the return of the manufacturers' excise taxes for the month of December 1933, filed by the Pacific Goodrich Rubber Company, Los Angeles, California.

The Clerk: Government's Exhibit 2.

(The document referred to was received in evidence and marked "Government's Exhibit No. 2.")

GOVERNMENT'S EXHIBIT 2

MANUFACTURER'S EXCISE TAXES

Sections 512-514 incl. *Fig.* Act of 1907;
Section 507, Rev. Act of 1908.

CHARACTER OF TAX		RATE	AMOUNT OF TAX	RECEIVED	AMOUNT OF TAX	
(1) Title	7 1/2%	18	721	<p>Total liability LIABILITY 23,524</p> <p>PAID BY SP 1934</p> <p>Period, 25 months</p> <p>Interest 18.00</p>	23 524	48
(2) Lower rates	10%	18	808		23 524	48
(3) Travel	10%					
(4) Travel preparations (postman, commission, etc.)	10%					
(5) Travel preparations (hotel, postman, hotel agent, etc.)	10%					
(6) Vehicle made for	10%					
(7) Janing	10%					
(8) Auto truck chassis and bodies	10%					
(9) Other auto chassis and bodies and motor cycle	10%					
(10) Parts and accessories	10%					
(11) Radio receiving sets, phonograph records, etc.	10%					
(12) Mechanical refrigerators	10%					
(13) Sporting goods	10%					
(14) Firearms, shells, and cartridges	10%					
(15) Cameras and lenses	10%					
(16) Camels	10%					
(17) Clothing items	10%					
(18) Pistols and revolvers	10%					

I swear (or affirm) that the foregoing is a true return of the amount of tax due for the month of DEC 1934 and that the amount of the credit deducted is correct and allowable by law.

Signed PACIFIC GOODRICH RUBBER COMPANY

(State whether individual owner of business, member of firm, or if officer of corporation or duly authorized manager or agent, give title)

Auduball Auditor

Subscribed and subscribed before me this 29 day of Jan 1934

Notary Public

(Notary Public or Notary at Large) (Notary at Large) (Notary at Large)

ORIGINAL RETURN.—This form must be returned to the Collector of Internal Revenue.

INSTRUCTIONS

(For full instructions see Regulations 46, June, 1982, and Regulations 47, revised Oct., 1980)

1. LAW.—The Revenue Act of 1932 imposes taxes upon the following articles sold by the manufacturer, producer, or importer:

	Rate
002 (a) Tires wholly or in part of rubber (exclusive of metal rims and rim bases)—on total weight.....	2 1/2 cts. per lb.
(b) Inner tubes (for tires) wholly or in part of rubber—on total weight.....	1 cts. per lb.
003 (a) Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, aromatic cachous, toilet powders, and any similar substance, article, or preparation, by whatever name known or distinguished.....	10% of sale price.
(b) Toilet and mouth washes, dentifrices, tooth paste, and toilet soap.....	5% of sale price.
004 (a) Articles made of fur or on the hide or pelt, or of whiskered or whiskered of chief value.....	10% of sale price.
(b) All articles commonly or commercially known as jewelry, whether real or imitation; pearls, precious and semiprecious stones, and imitations thereof; articles made of, or ornamented, mounted, or fitted, with precious metals or imitations thereof or ivory (not including surgical instruments or other plated ware); watches, clocks, or watches for spectacles (or eyeglasses); watches, clocks, parts for watches or clocks sold for more than 8 cents each; opera glasses; lorgnettes; marine glasses; field glasses; and binoculars.....	10% of sale price.
No tax is imposed on any article used for religious purposes or on any article (other than watch parts or clock parts) sold for less than \$3.00.	
005 (a) Auto truck chassis and auto truck bodies (including in both cases parts or accessories therefor sold on or in connection therewith or with the sale thereof).....	2% of sale price.
(b) Other auto chassis and bodies and motor cycles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), except tractors.....	2% of sale price.
006 (a) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b).....	2% of sale price.
(b) Chassis, cabinets, tubes, reproducing units, power packs, and phonograph mechanisms, suitable for use in connection with or as part of radio receiving sets or combination radio and phonograph sets (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), except parts or accessories for phonographs.....	2% of sale price.
007 (a) Household type refrigerators (for single or multiple cabinet installations) operated with electricity, gas, kerosene, or other means (including parts or accessories therefor, sold on or in connection therewith or with the sale thereof).....	2% of sale price.
(b) Cabinets, compressors, condensers, expansion units, absorbers, and controls for, or suitable for use as part of or with, any of the articles enumerated in subsection (a) (including in each case parts or accessories therefor, sold on or in connection therewith or with the sale thereof) except when sold as component parts of complete refrigerators or refrigerating or cooling apparatus.....	2% of sale price.
008 (a) Sporting goods, games, etc.....	10% of sale price.
(b) Firearms, shells, and cartridges. The tax does not apply (a) to articles sold for the use of the United States, any State, Territory, or possession of the United States, or for the United States Government, or (b) to pistols or revolvers.....	10% of sale price.

2-1903

B-4

Mr. Jewell: I also offer into evidence a copy of the claim for abatement for the period from June 21, 1932 through June 30, 1934, filed on July 8, 1936, by The B. F. Goodrich Company, successor to the Pacific Goodrich Company, at Akron, Ohio.

The Clerk: Government's Exhibit 3.

(The document referred to was received in evidence and marked "Government's Exhibit No. 3.") [11]

GOVERNMENT'S EXHIBIT 3

CLAIM

To be filed with the Collector where assessment
was made or tax paid

Received Jul. 8, 1936. Collector of Internal Revenue, 18th Dist. of Ohio. Claims Division.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[] Refund of tax illegally collected.

[] Refund of amount paid for stamps unused, or used in error or excess.

[x] Abatement of tax assessed (not applicable to estate or income taxes).

State of Ohio,

County of Summit—ss.

Name of taxpayer or purchaser of stamps—The
B. F. Goodrich Company, successor to Pacific
Goodrich Rubber Company.

Business address—500 South Main Street, Akron,
Ohio.

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Los Angeles, California District.
2. Period (if for income tax, make separate form for each taxable year) from June 21, 1932 thru June 30, 1934.
3. Character of assessment or tax—excise tax.
4. Amount of assessment, \$33,876.26 plus interest in sum of \$7,701.48.
5. Date stamps were purchased from the Government—Excise tax incurred during various months for period above named.
6. Amount to be refunded—\$.....
7. Amount to be abated (not applicable to income or estate taxes)—full amt. of assessment, namely \$33,876.26 plus interest in sum of \$7,701.48.
8. The time within which this claim may be legally filed expires, under Section.....of the Revenue Act of 19....., on, 19.....

The deponent verily believes that this claim should be allowed for the following reasons:

See Exhibit “A”, consisting of four typewritten

pages, attached hereto and made a part of this claim.

(Signed) THE B. F. GOODRICH COMPANY,
Successor to The Pacific Goodrich
Rubber Company
By [Name illegible]

(Seal) Treas.

Sworn to and subscribed before me this 7th day
of July, 1936.

ALBERTA M. TEWERS
Notary Public

My Commission expires December 15, 1938.
(See Instructions on Reverse Side)

Exhibit "A"

Reference is made to the report of Internal Revenue Agents, A. M. Memminger, George L. Carr, and Fred L. MacCarroll, dated March 4, 1936, in which it is recommended that an assessment of additional excise tax in the sum of \$33,876.26, plus appropriate interest, be made against the Pacific Goodrich Rubber Company.

Pacific Goodrich Rubber Company transferred its assets to The B. F. Goodrich Company on or about June 30, 1934, and was dissolved December 21, 1934. Hence, the proper taxpayer is The B. F. Goodrich Company.

The taxpayer insists that the recommendation of the Revenue Agents is erroneous and hereby protests any assessment of additional excise taxes for

the period involved, based upon said recommendation, for reasons hereinafter set forth.

Schedule #1. "Borrowed Tires"—\$11,057.97

The Revenue Agents' report proposes an assessment under the above schedule against tires which Pacific Goodrich Rubber Company delivered to The B. F. Goodrich Rubber Company after June 21, 1932, for which no tax was paid in the Pacific Goodrich Rubber Company returns. The tires in question were tires delivered in repayment of the loan of inventory from time to time made by The B. F. Goodrich Rubber Company to the Pacific Goodrich Rubber Company in order to permit the latter company to meet delivery requirements of its automobile manufacturers, export and government customers. Such deliveries were made on the same basis as the types and sizes originally borrowed.

There was in existence prior to the effective date of the excise tax levied by Section 602 of the Revenue Act of 1932, a contract between The B. F. Goodrich Rubber Company and Pacific Goodrich Rubber Company under which the latter company took the entire production of Pacific Goodrich Rubber Company as manufactured, said contract reserving the right in Pacific Goodrich Rubber Company to supply certain customers, among which were the class of customers above set out, the reason for reserving this right being due to competitive conditions which necessitated the sale of tires by a manufacturer direct to these customers. For the period from November, 1932 through June 1933,

the manufacturer's stock of tires was so out of balance that it was necessary for it to secure tires from The B. F. Goodrich Rubber Company for delivery to its customers. The inventory in the hands of The B. F. Goodrich Rubber Company which had been delivered by Pacific Goodrich Rubber Company subsequent to the effective date of Section 602 of the Revenue Act of 1932 was tax paid tires. If the Pacific Goodrich Rubber Company had paid a tax on tires which it delivered to The B. F. Goodrich Rubber Company in repayment of loans, such tires would have been subjected to a double tax.

The B. F. Goodrich Company, the parent company of both Pacific Goodrich Rubber Company and The B. F. Goodrich Rubber Company, had a contract with The B. F. Goodrich Rubber Company similar to that between Pacific Goodrich Rubber Company and The B. F. Goodrich Rubber Company. It also found itself in a similar condition to that of Pacific Goodrich Rubber Company with reference to its inability to make deliveries to its customers because of an unbalanced stock of merchandise, early in the tax period involved in this case. The B. F. Goodrich Company presented its problem to the Deputy Commissioner of Internal Revenue and received a ruling from that officer that it could borrow tires under the circumstances above outlined, from its selling organization and return the same without incurring an excise tax at the time such tires were returned. After such ruling

had been secured from the Deputy Commissioner's office, Revenue Agents Dodson and MacCarroll made an examination of the books and records of The B. F. Goodrich Company for the purpose of determining its tax liability for the period from June 21, 1932 to December 31, 1932. The report of the above named Revenue Agents recommended an assessment of additional tax upon tires delivered to The B. F. Goodrich Rubber Company under the above outlined circumstances. This proposal was again considered by the Deputy Commissioner of Internal Revenue and the recommendation of Revenue Agents Dodson and MacCarroll was not approved and no additional tax was assessed, the Deputy Commissioner holding that such transaction was not a taxable transaction. Subsequent to this ruling, and on or about May 20, 1933, the Secretary of the Treasury executed with The B. F. Goodrich Company an agreement on Treasury Department Form 866. As soon as The B. F. Goodrich Company received the Commissioner's first ruling that the delivery of tires to The B. F. Goodrich Rubber Company by the manufacturer, under the circumstances above outlined, did not constitute a taxable transaction, it advised its subsidiary, the Pacific Goodrich Rubber Company, of such ruling.

Consequently, the transaction upon which the Revenue Agents are proposing an assessment of additional tax under Schedule #1 is a transaction which the Deputy Commissioner's office has heretofore held to be a non-taxable transaction.

The Pacific Goodrich Rubber Company did not "attempt in any manner to evade or defeat any tax or the payment thereof under Articles IV, V, VI, VII, VIII and/or IX." On the other hand, the taxpayer, through its parent company, advised the Deputy Commissioner of Internal Revenue just how these transactions were being treated and secured that officer's approval of so handling such transaction.

The position of the Internal Revenue Agents that the transaction above described was an attempt to rescind a completed sale is erroneous. There was never any cancellation of charges for tires sold by the Pacific Goodrich Rubber Company to The B. F. Goodrich Rubber Company and no merchandise was returned, so far as the transactions above described are concerned, both of which would be necessary in order to rescind a sale.

The taxpayer insists that the transactions above described are not taxable under the law and the interpretation of said law relied upon by the taxpayer, and that no part of the tax proposed in Schedule #1 should be assessed.

Schedule #2. "Sales to Chevrolet Motor Company"
—\$1,060.29

Statements made in connection with proposed tax under Schedule #1 apply generally to the tax proposed under Schedule #2 and the taxpayer's position with reference to the tax suggested under this schedule is the same as under Schedule #1.

The only appreciable difference in the facts governing the transaction involved in this schedule is that some of the tires borrowed by Pacific Goodrich Rubber Company were of the manufacture of The B. F. Goodrich Company.

Schedule #3. "Credits taken for Borrowed Tires"
—\$3,443.30.

The facts in connection with the transaction involved under this schedule are the same as under Schedule #1 except that Pacific Goodrich Rubber Company did not repay The B. F. Goodrich Rubber Company for tires borrowed from it by type and size, due to the fact that both The B. F. Goodrich Rubber Company and Pacific Goodrich Rubber Company transferred their assets and were dissolved during 1934, and the only way by which Pacific Goodrich Rubber Company could liquidate its obligation to The B. F. Goodrich Rubber Company was through the delivery of tires of the same value as those previously borrowed, without regard to size and type.

The taxpayer insists that the handling of an isolated transaction in this manner could in no event affect the principle. Neither does it justify the assessment of the tax recommended by the Agents under this schedule.

Schedule #4. "Credit taken on sales made by The B. F. Goodrich Rubber Company to International Goodrich Rubber Company for export"
—\$11,305.72.

Pacific Goodrich Rubber Company complied with the provisions of Treasury Department Decision 4355 in connection with credits taken by it on merchandise sold into export through its subsidiary selling company. The documents supporting the handling of transactions in accordance with Treasury Decision 4355 are on file in the offices of The B. F. Goodrich Company at Akron, Ohio. The Revenue Agents making the examination were advised of this fact prior to the time the examination was made and during the examination. Documents supporting the credits taken under this schedule are, of course, quite numerous and the sending of these documents from Akron to Los Angeles would involve a considerable amount of trouble and expense as well as endanger the safety of such records. For this reason, the records were not sent to Los Angeles. The B. F. Goodrich Company hereby tenders these records to the Deputy Commissioner or any of his agents in its office in Akron, Ohio, or if the Commissioner insists, copies of such documents will be filed with the Deputy Commissioner's office.

The Revenue Agents' statement that credits involved under this schedule were not taken in accordance with these regulations is incorrect.

Schedule #5. "Credits taken on Tire Adjusted"—
\$6,908.98

The Pacific Goodrich Rubber Company took credits on tires adjusted under its guaranty on the

same basis as did The B. F. Goodrich Company, namely, credit was taken for all adjustments made under the manufacturer's guaranty, either expressed or implied, through the various agents and dealers of the manufacturer. In some cases, the defective tires were returned to the manufacturer; in others, they were not. In all instances, where a new tire was given to a customer through a dealer or agent of Pacific Goodrich Rubber Company, the tire which the agent or dealer gave to the customer was one which was furnished to it by the Pacific Goodrich Rubber Company, whether such tire was furnished for that specific purpose and directly following the adjustment or at some future time when shipment or delivery of that tire could be more conveniently and less expensively made to the dealer, and the cost of all adjustments was borne by Pacific Goodrich Rubber Company, the manufacturer liable to the customer for a defective tire.

The Revenue Agents' suggestion that The B. F. Goodrich Rubber Company, Goodrich Silvertown Stores, Inc. (Goodrich Silvertown Inc.), Pacific Goodrich Rubber Company, and other subsidiaries of The B. F. Goodrich Company should all be considered as one unit for tax purposes in order to allow this credit cannot be insisted upon by the taxpayer for such are not the facts. All of these corporations were separate entities doing business with each other at arm's length, upon a definite contract basis. A further fallacy in this suggestion is that in order to accomplish the purpose suggested

by the Revenue Agents, dealers would likewise have to be considered as a part of the Goodrich unit since a number of adjustments were made by dealers and since Pacific Goodrich Rubber Company's relations, so far as its sales and adjustments were concerned, were the same with the companies above named as with any other dealers.

"Brunswick Tires"

Payment of excise tax due on the sale of 835 Brunswick tires to the Cleveland office instead of the Los Angeles office, was the result of an error and if it is necessary to make any correction with reference to the District to which this tax was paid, it is suggested that an easier way to make this correction would be through an adjustment by the Government, particularly since the corporation who would have to pay any additional tax to Los Angeles is the same corporation who would file a claim for refund for the erroneous payment in Cleveland.

The facts set forth herein are supported by books, records and documents at the office of The B. F. Goodrich Company, Akron, Ohio.

The principle involved in connection with the tax recommended for assessment under Schedules 1, 2 and 5 have already been passed upon by the Deputy Commissioner and approved both through his act of declining to assess additional tax on recommendations made by the Internal Revenue Agents and by the closing agreement on Form 866. While the transaction upon which the Revenue Agents base

their recommendations for the assessment of the tax under Schedule #3 is not exactly the same as those involved as to Schedule #1, the taxpayer insists the principle is the same and that the principle has been passed upon by the Deputy Commissioner favorably to the taxpayer.

The Revenue Agents' recommendation with reference to an assessment of tax proposed under Schedule #4 is apparently based upon the lack of evidence required by Treasury Decision 4355 in connection with export credits. This information is available and can be checked in any manner in which the Government cares to have it checked.

In view of the foregoing, the taxpayer respectfully requests that the recommendation set forth in the Revenue Agents' report above referred to be disregarded and that no additional tax be assessed against The B. F. Goodrich Company as successor to Pacific Goodrich Rubber Company on the basis outlined in said report.

I certify that an examination of the record of this office shows the following amounts to the account and payment of the tax:

Total.

by that the records of this office show the following in connection with the purchase of stamps:

See Cl. No. A-6775
A-37425
B-28598

ENTERED

6170

SEP 30 1937

Collector of Internal Revenue

184. 231.

(District)

COMMITTEE ON CLAIMS

Claims examined by—

Claim approved by—

Amount claimed... ~~803,876.00~~

Amount allowed... \$

Amount rejected... \$44,577.74

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim sworn to by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the decedent, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, or successor to the fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

E-2

Mar. 1933	Misc. 1933	May 1005	8	144,410	70	5/1/33	144,410	70	Pd.
Apr. 1933	Misc. 1933	June 1008	4	303,166	12	6/1/33	303,166	12	Pd.
May 1933	Misc. 1933	July 1017	2	440,183	92	7/6/33	440,183	92	Pd.
June 1933	Misc. 1933	Aug. 1005	3	539,669	15	8/1/33	539,669	15	Pd.
July 1933	Misc. 1933	Sept. 1002	1	451,628	75	9/1/33	451,628	75	Pd.
Aug. 1933	Misc. 1933	Oct. 1013	1	364,751	00	10/2/33	364,751	00	Pd.
Sept. 1933	Misc. 1933	Nov. 1007	2	249,852	39	11/1/33	249,852	39	Pd.
Oct. 1933	Misc. 1933	Dec. 1014	8	185,058	28	12/2/33	185,058	28	Pd.
Nov. 1933	Misc. 1934	Jan. 1014	5	152,368	63	1/3/34	152,368	63	Pd.
Dec. 1933	Misc. 1934	Feb. 1015	2	218,358	45	2/2/34	218,358	45	Pd.
Jan. 1934	Misc. 1934	Mar. 1017	5	201,954	92	3/3/34	201,954	92	Pd.
Feb. 1934	Misc. 1934	Apr. 1009	9	274,975	99	4/3/34	274,975	99	Pd.
Mar. 1934	Misc. 1934	May 1012	2	343,956	05	5/2/34	343,956	05	Pd.
Apr. 1934	Misc. 1934	June 1013	6	383,037	26	6/2/34	382,037	26	Pd.
May 1934	Misc. 1934	July 1017	4	419,790	92	7/5/34	419,790	92	Pd.
June 1934	Misc. 1934	Aug. 1008	0	186,139	33	8/2/34	186,139	33	Pd.
Add'l Tax Nov & Dec/33	Misc. 1934	Apr. 1019	7	33,896	61	4/10/34	33,896	61	Pd.

June to Dec. 1912

5/21/34

1. NAME _____
 2. DATE _____
 3. TIME _____
 4. LOCATION _____
 5. REMARKS _____
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 215. REMARKS _____
 216. SIGNATURE _____
 217. INITIALS _____
 218. DATE _____
 219. TIME _____
 220. LOCATION _____
 221. REMARKS _____
 222. SIGNATURE

E-3

Mr. Jewell: We offer into evidence a copy of claim for abatement, filed on May 19, 1936 by Nat Rogan, for the Pacific Goodrich Rubber Company, Los Angeles, California.

The Clerk: Government's Exhibit 4.

(The document referred to was received in evidence and marked "Government's Exhibit No. 4.")

GOVERNMENT'S EXHIBIT 4

CLAIM

To be filed with the Collector where assessment
was made or tax paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☐ Refund of tax illegally collected.
- ☐ Refund of amount paid for stamps unused, or used in error or excess.
- ☒ Abatement of tax assessed (not applicable to estate or income taxes).

State of Calif.,

County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps—Collector for Pacific Goodrich Rubber Co.

Business address—Los Angeles, Calif.

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on be-

half of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed.....
2. Period (if for income tax, make separate form for each taxable year) from, 19..., to....., 19....
3. Character of assessment or tax.....
4. Amount of assessment, \$.....; dates of payment
5. Date stamps were purchased from the Government
6. Amount to be refunded—\$.....
7. Amount to be abated (not applicable to income or estate taxes)—\$41,577.74.
8. The time within which this claim may be legally filed expires, under Section of the Revenue Act of 19..., on, 19....

The deponent verily believes that this claim should be allowed for the following reasons:

Abatement is asked of assessment on my March 1936 Misc. list, 2018/8, in accordance with Bureau instructions. See copy of telegram attached.

(Signed) NAT ROGAN

Collector

Sworn to and subscribed before me this 27 day of May, 1936.

DOROTHY F. HARRIS

Dep. Coll.

[Telegram]

Postal Telegraph

Collector Internal Revenue

LosA

May 18, 1936.

Re assessment page twenty eighteen line eight
your March nineteen thirty six miscellaneous assess-
ment list against Pacific Goodrich Rubber Co Los
Angeles Suggest you file Collectors abatement claim
since assessment should have been against B F
Goodrich Company Akron Ohio and amount rec-
ommended also appears excessive

BLISS

Deputy

NO PREVIOUS CLAIM

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered	Tax	Year	Month	Assessment No.		Amount	Paid, Abated or Refunded		Date	Amount	Date
				Page	Line		Date	Amount			
Excise tax	Misc	1936	Mar.	2018	8	\$ 33,876.26					
Interest						\$ 7,701.48					
Total						\$ 41,577.74	Total		\$		

DATE LISTED BY
COMMISSIONER *[Signature]*

Claim No.

I certify that the records of this office show the following facts as to the purchase of stamps: *1-3-36*

To Whom Sold or Issued	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp, state	
						Serial number	Period commencing

39896

39896

6 Calif

Collector of Internal Revenue.

(District)

Claim examined by—
[Signature]

Claim approved by—
[Signature]
Chief of Division

Amount claimed \$ 41,577.74

Amount allowed \$ 41,577.74

Amount rejected \$

COMMITTEE ON CLAIMS

DEPUTY COMMISSIONER

[Signature]

INSTRUCTIONS

- The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.
- The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.
- If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.
- Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

Mr. Jewell: With the Court's permission, I would like to confer with counsel.

The Court: Very well.

(Conference between counsel.)

Mr. Jewell: Reference is made to Paragraph (6)a of the stipulation on file herein. I believe it will be stipulated that that paragraph will be corrected to eliminate the statement there that the principal of the tax was assessed, and will be made to read so that the principal and interest were demanded, not assessed, of the Pacific Goodrich Company on the date—I believe April 10, 1934—and that the principal of that additional tax was never assessed but that the interest was assessed on June 9, 1934.

Mr. Leslie: Mr. Jewell, would you modify your stipulation by saying, "not formally assessed"—Otherwise I have no objection.

Mr. Jewell: That it was not formally assessed.

The Court: That is the principal——

Mr. Jewell: That is the principal; thereby meaning that the amount was not shown as due on the assessment roll when the assessment roll was signed by the Commissioner of Internal Revenue.

The Defendant rests.

Mr. Blanche: If the Court please, I believe that we may have a stipulation from counsel for the Government to the effect that the materiality and the relevancy of the exhibits introduced by the Gov-

ernment, not as to the competency, may be raised at any time.

Mr. Jewell: So stipulated.

Mr. Blanche: Prior to the submission and filing of the brief.

The Court: So understood.

Mr. Blanche: With the consent of the counsel for the Government, I would like to make a few typographical corrections in the amended petition. The various amounts were discovered only after the first amended petition was filed.

On page 6, paragraph 7, line 25, the date should be "April 18" in lieu of "April 17."

The next correction appears on line 1, of page 7, of paragraph XIV, and it is the same correction as noted before, namely, that "April 17" is corrected to read "April 18."

The Court: Gentlemen, the date as shown on the photostatic copy of the claim and is annexed to the first amended petition on page 8 thereof, are those dates to remain the same—Under statement "H", arabic eight—

Mr. Leslie: That is on the claim, your Honor—I am sorry; I don't follow you.

(The document referred to was passed to counsel.)

Mr. Leslie: This date should be "April 18," is that the point—

The Court: Yes.

Mr. Leslie: That is correct, your Honor. That should be changed to "April 18."

The Court: Then the record shows that the change should be made on the claim which appears annexed to page 8 of the first amended petition to "April 18" instead of "April 17"—I suppose that will be true wherever the date "April 17" appears.

Mr. Leslie: I was about to suggest, your Honor, that we stipulate that where the date "April 17" appears it should be "April 18."

The Court: Is that stipulated, Mr. Jewell—

Mr. Jewell: So stipulated.

The Court: Are there any dates to be supplied in paragraph IX, page 9, beginning at line 5: "That plaintiff on or about April * * *"——

Mr. Blanche: (Interrupting): Yes, your Honor. That is April 10. That appears throughout the petition. We suggest a stipulation to the effect that "April 10" in each case be deemed to be the date.

Mr. Jewell: So stipulated. [14]

Mr. Blanche: The next correction would be page 12, paragraph XI, line 14, the figures "784,177" should be "782,474," for the reason that while a tax was paid on 784,177, the records of the company did not demonstrate that there was more than 782,474 pounds of the tire fabric thread and other materials on hand and which were consumed in the making of tires between August 1, 1933 and January 5, 1934.

The Court: That corrected figure then is 782,-474——

Mr. Leslie: Correct.

Mr. Blanche: Yes, your Honor.

The Court: Of course, the Government does not object to that. It is a lesser amount.

Mr. Jewell: I will so stipulate. I have examined the records, your Honor.

Mr. Blanche: The next correction appears on page 13, line 7; the figures "757,260" should be "705,806."

The next correction is on line 8, page 13, paragraph XII, the figure "784,177" should be "782-474."

The next correction appearing on the same page but in paragraph XIII, the figure "757,260" should be changed to "705,806."

The Court: Shouldn't that correction on line 8 of paragraph XII, read "782,477" or "474"——

Mr. Blanche: 474.

The next correction occurs on page 14, paragraph XII, line 6; the figure "757,260" again becoming "705,806."

The Court: Paragraph XIII——[15]

Mr. Blanche: Paragraph XIII, on page 14; yes, your Honor.

I believe your Honor has noted that on line 13, paragraph XIV, of page 14, "April 17" becomes "April 18."

The Court: Yes.

Mr. Blanche: With those typographical amendments, the Plaintiff rests.

Mr. Jewell: I would like the Court's permission to confer with counsel for the Plaintiff.

The Court: Very well.

(Conference between counsel.)

Mr. Blanche: Counsel for the Government, if the Court please, and counsel for the Plaintiff have suggested, subject to the Court's wishes, that counsel for the Plaintiff may have 20 days within which to file an opening brief.

I might suggest that the 20 days might start to run from Monday next, for the reason that the brief will be largely prepared in Akron, and the time of transmittal occasioned thereby will give us a little longer time.

The Court: So ordered. Twenty days from Monday—that is Lincoln's birthday—20 days from February 13th.

Mr. Blanche: Very well, your Honor.

And also it has been suggested that the Government have likewise 20 days and Plaintiff have a further 10 days.

We offer that stipulation.

The Court: So ordered. [16]

Upon the filing of the last brief, pursuant to rule, the cause will stand submitted for decision.

The record should show that the Court has indicated on the original files the first amended petition certain pencil notations in accordance with the suggested corrections, and if it is satisfactory the corrections may be made by the Clerk on the original file.

Mr. Blanche: So stipulated, your Honor.

Mr. Jewell: So stipulated.

The Court: Is that all, Mr. Hansen——

The Clerk: Yes, your Honor.

(Whereupon, at 10:40 o'clock a.m., February 10, 1940, the above-entitled matter stood submitted.)

State of California,

County of Los Angeles—ss.

I, A. Wahlberg, an official reporter of the District Court of the United States in and for the Southern District of California, Central Division, do hereby certify that the foregoing pages 1 to 17, both inclusive, comprise a duplicate copy of the original full, true and correct transcript of the testimony taken and proceedings had on the 10th day of February, 1940, in the hearing of the case of the B. F. Goodrich Company, a corporation, plaintiff, v. United States of America, defendant, No. 8138-M Civil, and that said transcript contained on said pages comprises all of the statements of counsel and of the court and ruling of the court made during the progress of said hearing on said day; and that the original of said transcript was delivered on February 20, 1940, to the Honorable Paul J. McCormick, the Judge before whom the aforementioned hearing was had.

Dated: this 29th day of January, 1942.

A. WAHLBERG

Official Reporter

[Endorsed]: Filed Jan. 29, 1942.

[Title of District Court and Cause.]

DEFENDANT'S REPLY BRIEF

* * * * *

III.

* * * * *

“Plaintiff’s only offer of proof consists of the statement of one of its officers (submitted in stipulation form). The Government objects to the materiality of these statements on the ground that they are not the best evidence to show that the tax was not passed; that the best evidence consists of the books and records of sales of plaintiff’s predecessor.”

* * * * *

[Endorsed]: No. 10035. United States Circuit Court of Appeals for the Ninth Circuit. The B. F. Goodrich Company, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed January 30, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Circuit Court of Appeals for the Ninth
Circuit

No. 10035

THE B. F. GOODRICH COMPANY, a corpora-
tion,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

STATEMENT OF POINTS TO BE RELIED
UPON AND DESIGNATION OF THE
PARTS OF THE RECORD TO BE
PRINTED.

Comes now The B. F. Goodrich Company, a corporation, the appellant in the above entitled cause, and states that the points upon which it intends to rely in this court in this case are the following:

I.

The court erred in denying plaintiff's motion to reopen case to admit further proof (record on appeal, p. 83).

II.

The court erred in that it abused its discretion in denying plaintiff's motion to reopen case to admit further proof (record on appeal, p. 83).

III.

The court erred in sustaining defendant's objection to the following stipulated testimony of the witness George Hubbell, as set forth on pages 4, 5, 9 and 10 of the stipulation of facts (record on appeal, pp. 59, 60, 64, 65):

"That the books and records of said Pacific Goodrich Rubber Company * * * were and are kept under the supervision and control of the said George Hubbell, his duties being, among others, to keep said books and records; that he, the said George Hubbell is familiar with and knows the prices at which tires were sold by Pacific Goodrich Rubber Company at all the times mentioned in said First Amended Petition herein and is familiar with and knows whether or not there was included in the price of the tires sold by Pacific Goodrich Rubber Company during the period from August 1, 1933 to the 5th day of January, 1934, any amount to cover any excise tax on the processed cotton contained in the tires manufactured and sold by Pacific Goodrich Rubber Company during said period, and is familiar and knows whether the prices at which Pacific Goodrich Rubber Company sold tires during said period containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act were any greater than the prices at which during said period Pacific Goodrich Rubber Company sold

tires containing processed cotton on which a tax was payable under Section 9-a of the Agricultural Adjustment Act, * * *

* * *

“* * * and that Pacific Goodrich Rubber Company did not include nor did it intend to include in the price of tires sold during the period from August 1, 1933 to the 5th day of January, 1934, any amount to cover any excise tax on the processed cotton contained in the tires manufactured and sold during said period; and that the prices at which Pacific Goodrich Rubber Company sold said tires during said period, containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act, were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was payable under Section 9-a of the Agricultural Adjustment Act, * * *”

Defendant's objection, made on page 14 of defendant's reply brief, the original of which is included in the record on appeal, reads as follows:

“Plaintiff's only offer of proof consists of the statement of one of its officers (submitted in stipulation form). The Government objects to the materiality of these statements on the ground that they are not the best evidence to show that the tax was not passed; that the best evidence consists of the books and records of sales of plaintiff's predecessor.”

The court's ruling, appearing on pages 11 and 12 of the conclusions of the court on the merits of the action (record on appeal, pp. 78, 79), reads as follows:

“The burden of proving its right to refund rests throughout the action upon the plaintiff corporation and this burden is not sustained unless satisfactory evidence preponderates in plaintiff's favor, particularly that there has been no inclusion or collection by Pacific Goodrich Rubber Company of the tax in the price of the tires which have been sold by Pacific Goodrich Rubber Company. Substantially the only evidence produced upon this vital point is in the form of a stipulation entered into by Government counsel with the reservation as to its sufficiency, that the cashier and auditor of the taxpayer corporation would if called as a witness testify that he supervised, controlled and kept the books and records of the Pacific Goodrich Rubber Company at all times pertinent to this action and that he is familiar with and knows the prices at which tires were sold by the taxpayer at all applicable times; that he knows that during the period from August 1, 1933, to January 5, 1934, the taxpayer did not include or intend to include in the price of tires sold during such period any amount to cover any excise tax on the processed cotton contained in the tires manufactured and sold during such

period; that the prices at which the taxpayer sold tires during such period were no greater on tires containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act than the prices at which during such period it sold tires containing processed cotton on which a tax was payable under Section 9 of the Triple A. No books of account or sales records were produced and no explanation for their nonproduction was made at the hearing, although the Government objected to the sufficiency of the proof that was offered on this crucial factual issue. We are not satisfied that the required burden of the nonpassage of the tax to vendees of the taxpayer has been sustained.”

In the trial of this action counsel for plaintiff and defendant stipulated as follows (reporter's transcript, pp. 5-7, a certified copy of which is included in the record on appeal):

“Mr. Blanche: If it please the Court, at this time I propose to offer a stipulation of facts in this matter which has been signed by counsel for the Government and counsel for the petitioner, the plaintiff.

“By stipulation of counsel for the Government, there will be no question of a foundation raised. However, there may be raised, either at this time, or at the time of the filing of the brief, a question regarding, or questions regarding, the materiality of the facts stipulated to,

the relevancy of the facts stipulated to and of the sufficiency of the proof made.

“We appreciate that the latter may always be raised, but in order that there be no misunderstanding we make that statement.

“The latter sufficiency of the proof made particularly pertains to the question of whether the tax was passed on to the consumer or whether the tax was subsequently billed by the consumer after the tax was assessed and levied.

“It is our contention, of course, that inasmuch as the tax was not levied until some four months after the return, we were not apprised of it, we did not include it in the price of the commodity, and there is a statement to the effect that it was not covered with subsequent billing.

“This stipulation, if the Court please, takes two forms. The first form is a stipulation as to ultimate facts, these having to do with items that are not denied in the first amended petition. The second takes the form that if two particular witnesses were called they would testify as set forth in the stipulation.

“Is that a correct statement, Mr. Jewell——

“Mr. Jewell: That is a correct statement.

“The Court: I suppose that the stipulation that they would so testify is also made subject to the materiality and relevancy of that evidence.

“Mr. Blanche: Yes, your Honor.”

IV.

The court erred in that it wholly failed and refused to make a finding upon the material issue of fact as to whether or not the right to the refund of the manufacturer's excise tax and the interest thereon sought to be recovered in this action was at any time acquired by plaintiff from the Pacific Goodrich Rubber Company.

V.

The court erred in that it wholly failed and refused to make a finding upon the material issue of fact as to whether or not the right to the refund of the manufacturer's excise tax and the interest thereon sought to be recovered in this action was assigned, transferred and delivered by the Pacific Goodrich Rubber Company to the plaintiff on or about June 30, 1934, in anticipation of the immediate dissolution of the Pacific Goodrich Rubber Company and as a distribution in kind of all of the assets of that company to plaintiff as its sole stockholder.

VI.

The court erred in that it wholly failed and refused to make a finding upon the material issue of fact as to whether or not the right to the refund of the manufacturer's excise tax and the interest thereon sought to be recovered in this action, if not acquired by plaintiff as provided in paragraph V, *supra*, or in paragraph VII, *infra*, passed to plaintiff as the sole stockholder of the Pacific Goodrich

Rubber Company upon the dissolution of that company on or about December 21, 1934.

VII.

The court erred in that it wholly failed and refused to make a finding upon the material issue of fact as to whether or not the right to the refund of the manufacturer's excise tax and the interest thereon sought to be recovered in this action, if not acquired by plaintiff as provided in paragraph V or VI, *supra*, was assigned, transferred and delivered by the Pacific Goodrich Rubber Company to the plaintiff on or about August 14, 1935, as a distribution in kind of all the assets of the Pacific Goodrich Rubber Company to plaintiff as its sole stockholder pursuant to the dissolution of said company on or about December 21, 1934.

VIII.

The court erred in failing and refusing to find the following facts for the reason that such facts are ultimate facts supported by competent evidence and there is no finding of fact to the contrary and a total absence of any evidence, competent or otherwise, to support a contrary finding.

That at the close of business on June 30, 1934, the officers of the predecessor in interest of the plaintiff, the Pacific Goodrich Rubber Company, in anticipation of immediate dissolution of that company, transferred and delivered over to the plaintiff possession and control of all of the property and assets

of the Pacific Goodrich Rubber Company, including the right to the refund of the manufacturer's excise tax and the interest thereon sought to be recovered in this action, as a distribution in kind of all of the assets of that company to the plaintiff as its sole stockholder. That as evidence of said distribution in kind the Pacific Goodrich Rubber Company on said 30th day of June, 1934, executed a written assignment by the terms of which it assigned, transferred and set over to the plaintiff all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or would have against any and all persons, firms or corporations. That a true copy of said written assignment is set forth at lines 1-28, inclusive, page 3, of the first amended petition of the plaintiff herein. That the aforesaid action of the officers of the Pacific Goodrich Rubber Company in making said distribution in kind of all of the assets of that company to the plaintiff, in anticipation of the immediate dissolution of said company, was ratified and approved, and the dissolution of said company authorized by the Board of Directors and by the stockholders of said company on July 6, 1934. That thereafter, to wit, on August 24, 1934, the execution and delivery to the plaintiff of the aforementioned written assignment of June 30, 1934, was ratified and approved by the Board of Directors of the Pacific Goodrich Rubber Company. That following the dissolution of said Pacific Goodrich Rubber

Company on or about December 21, 1934, said company, on August 14, 1935, executed a further written assignment as a supplement to the aforementioned assignment of June 30, 1934, by the terms of which supplemental assignment said company assigned and transferred to the plaintiff all claims, demands, choses in action or causes of action of whatsoever kind or nature which it had or might later have against all persons whomsoever including in particular its claim for refund of the manufacturer's excise tax and the interest thereon sought to be recovered in this action. That a true copy of said written assignment of August 14, 1935, is set forth at line 7, page 4, to line 11, page 5, inclusive, of the first amended petition of the plaintiff herein.

IX.

The court erred in that it failed and refused to make a finding upon the material issue of fact as to whether or not the Pacific Goodreih Rubber Company included or intended to include in the price of the tires sold by it during the period from August 1, 1933, through January 5, 1934, any amount to cover any excise tax on the processed cotton contained therein.

X.

The court erred in failing and refusing to find the following facts for the reason that such facts are ultimate facts supported by competent evidence and there is no finding of fact to the contrary and a

total absence of any evidence, competent or otherwise, to support a contrary finding:

That Pacific Goodrich Rubber Company did not include nor did it intend to include in the price of the tires sold by it during the period from August 1, 1933, through January 5, 1934, any amount to cover any excise tax on the processed cotton contained therein.

XI.

The court erred in that it failed and refused to make a finding upon the material issue of fact as to whether or not during the period from August 1, 1933, to April 10, 1934, the prices at which the Pacific Goodrich Rubber Company sold tires containing processed cotton on which a tax was paid under Section 16 of the Agricultural Adjustment Act were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was paid under Section 9(a) of said Act.

XII.

The court erred in failing and refusing to find the following facts for the reason that such facts are ultimate facts supported by competent evidence and there is no finding of fact to the contrary and a total absence of any evidence, competent or otherwise, to support a contrary finding:

That during the period from August 1, 1933, to April 10, 1934, the prices at which the Pacific Goodrich Rubber Company sold tires contain-

ing processed cotton on which a tax was paid under Section 16 of the Agricultural Adjustment Act were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was paid under Section 9(a) of said Act.

XIII.

The court erred in making and entering its following quoted conclusion of law No. V (record on appeal, p. 120), for the reason that said conclusion of law is contrary to law, is not supported by the facts found and to the extent that it may be deemed to be a finding of fact, it is not supported by the evidence in that all of the evidence, which was both competent and sufficient, was to the contrary, and for the further reason that said conclusion of law is irreconcilably inconsistent to the extent that the court concludes that the right to the refund of the tax which is sought to be recovered in this action was vested in the plaintiff by reason of the two written assignments of June 30, 1934, and August 14, 1935, and at the same time concludes that said assignments to the extent that they constituted assignments of a claim against the United States were absolutely null and void *ab initio* under the provisions of Sec. 3477 of the Revised Statutes:

"That the right to the refund of the tax which is sought to be recovered in this action was not acquired by the plaintiff by reason of its ownership of all of the stock of the Pacific

Goodrich Rubber Company or by the dissolution of that company or by the distribution in kind by said company of all of its assets to plaintiff, but vested in plaintiff by reason of the two written assignments executed by the Pacific Goodrich Rubber Company in favor of the plaintiff on June 30, 1934, and August 14, 1935, respectively. That said assignments to the extent that they constituted assignments of a claim against the United States were absolutely null and void ab initio under the provisions of Sec. 3477 of the Revised Statutes and the plaintiff accordingly acquired no rights thereunder to the refund of the tax herein sought to be recovered. That the plaintiff also acquired no right to the refund of the tax herein sought to be recovered by reason of its ownership of all of the stock of the Pacific Goodrich Rubber Company or by dissolution of that company or by the distribution in kind by said company of all of its assets to the plaintiff.”

XIV.

The court erred in making and entering its following quoted conclusion of law No. VI (record on appeal, p. 121), for the reason that said conclusion of law is contrary to law, is not supported by the facts found and to the extent that it may be deemed to be a finding of fact, it is not supported by the evidence in that all of the evidence, which was both competent and sufficient, was to the contrary:

“That under Sec. 621 (d) of the Revenue Act of 1932 only ‘the person who paid the tax’ can establish the facts required by that section to be established as a condition to the allowance of a refund of such taxes under Sec. 3220 of the Revised Statutes. That the plaintiff is not ‘the person who paid the tax’ within the meaning of that phrase as used in Sec. 621 (d) of the Revenue Act of 1932.”

XV.

The court erred in making and entering its following quoted conclusion of law No. VII (record on appeal, p. 121), for the reason that said conclusion of law is contrary to law, is not supported by the facts found and to the extent that it may be deemed to be a finding of fact, it is not supported by the evidence in that all of the evidence, which was both competent and sufficient, was to the contrary:

“That plaintiff failed to establish that the tax, the refund of which is sought by this action, was not passed on to the vendees or purchasers of the Pacific Goodrich Rubber Company within the requirements of Sec. 621 (d) of the Revenue Act of 1932.”

XVI.

That the court erred in rendering judgment for the defendant, the respondent herein (record on appeal, p. 122).

XVII.

That the judgment is contrary to law.

Appellant further states that the whole of the record on appeal, as certified by the clerk of the District Court and filed herein, including the reporter's transcript, original papers and exhibits, is deemed necessary to be printed for the consideration of the points set forth above.

Dated, this 30 day of January, 1942.

NEWLIN & ASHBURN

RAY J. COLEMAN

Counsel for appellant, The
B. F. Goodrich Company

[Endorsed]: Filed Jan. 31, 1942. Paul P.
O'Brien, Clerk.

Received copy of the within Statement of Points
to be relied upon and designation of the parts of the
record to be printed, this 30 day of January, 1942.

WILLIAM FLEET PALMER

United States Attorney

By ARMOND MONROE JEWELL

Attorneys for Respondent.

[Title of Circuit Court of Appeals and Cause.]

AMENDED DESIGNATION OF THE PARTS
OF THE RECORD TO BE PRINTED.

Comes now The B. F. Goodrich Company, a corporation, the appellant in the above entitled cause, and amends its designation of the parts of the record to be printed as follows:

It is deemed necessary by appellant for the consideration of the points set forth in its statement of points filed herein, that there be printed the whole of the record on appeal, as certified by the Clerk of the District Court and filed herein (including the reporter's transcript and exhibits), but excluding the brief of plaintiff and plaintiff's reply brief filed in the lower court and also all of the defendant's reply brief filed in the lower court, except for the following quoted paragraph appearing in the next to the last paragraph of Point III of said defendant's reply brief:

“Plaintiff's only offer of proof consists of the statement of one of its officers (submitted in stipulation form). The Government objects to the materiality of these statements on the ground that they are not the best evidence to show that the tax was not passed; that the best evidence consists of the books and records of sales of plaintiff's predecessor.”

Dated this 26th day of February, 1942.

NEWLIN & ASHBURN

RAY J. COLEMAN

Counsel for Appellant, The
B. F. Goodrich Company

[Endorsed]: Filed Feb. 27. 1942. Paul P.
O'Brien, Clerk.

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No. 10035.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE B. F. GOODRICH COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Facts.¹

This is an appeal from a judgment of the United States District Court, in and for the Southern District of California, Central Division, in favor of defendant-appellee upon a suit for recovery of additional manufacturer's excise tax assessed against and paid by appellant's predecessor in interest, Pacific Goodrich Rubber Company.

¹All italics ours unless otherwise noted.

Jurisdictional Facts.

Appellant, plaintiff below, is a corporation organized and existing under and by virtue of the laws of the State of New York and qualified to do business in the State of California. It filed its initial complaint in this cause in the United States District Court on October 1st, 1937, and, pursuant to stipulation and order of court [Tr. pp. 78-79], filed an amended complaint on February 5, 1940. The action was brought against the United States as defendant for the reason that John P. Carter, the Collector of Internal Revenue at Los Angeles, California, to whom the additional manufacturer's excise tax had been paid and for the recovery of which this action was brought, had died prior to the commencement of the action and on or about April 24, 1935 [Tr. p. 2, p. 50, p. 80, p. 142]. The action was one arising under the laws of the United States providing for internal revenue, particularly under Section 602 of the Revenue Act of 1932 (Act June 6, 1932, Ch. 209; 47 Stat. 261, 26 U. S. C. A. §3400) as modified by Act of May 12, 1933, Ch. 25, Section 9(a); 48 Stat. 35 (7 U. S. C. A. §609) and was for the recovery of manufacturer's excise tax on rubber tires erroneously and illegally collected by defendant [Tr. p. 6, p. 57, p. 89, pp. 141-142]. Jurisdiction of the cause was vested in the United States District Court under Judicial Code Section 24, subdivisions 5 and 20 (28 U. S. C. A. §41 (5) and (20)) and in this court on appeal under Judicial Code Sections 128 and 129 (28 U. S. C. A. §§225 and 226).

Statement of the Case.

The action was tried in the court below upon a stipulation of facts and no dispute exists between the parties thereon. The Pacific Goodrich Rubber Company, incorporated under the laws of the State of Delaware in 1927, was formally dissolved on December 21, 1934 [Tr. p. 81, p. 141, pp. 233-235]; that corporation was at all times prior to its dissolution the wholly owned subsidiary of appellant, The B. F. Goodrich Company, which held 100% of its stock [Tr. p. 82, pp. 142-143]. As a manufacturer and seller of tires, Pacific Goodrich Rubber Company (referred to for brevity as the "Pacific Company") was required to and did pay a manufacturer's excise tax under Section 602 of the 1932 Revenue Act at the rate of 2¼ cents per pound of total weight of tires sold;¹ returns were made and the tax paid monthly in accordance with the provisions of the Act (Sec. 626; 26 U. S. C. A. §3448).

On May 12, 1933, the ill-fated Agricultural Adjustment Act was passed and pursuant to Section 16(a) thereof (Act May 12, 1933, Ch. 25, Title I, §16; 48 Stat. 40; 7 U. S. C. A. §616) Pacific Company, plaintiff's predecessor in interest, was required to pay a tax upon the sale or disposition of any article processed wholly or in chief value from cotton which it had on hand on August 1, 1933 (the date the processing tax on cotton went into effect by proclamation of the Secretary of Agriculture),

¹For the convenience of the court the particular statutes with which this appeal is concerned are set forth in the appendix to this brief in the order in which they are referred to herein.

in an amount equivalent to the tax which would have been paid on said cotton had it actually been processed after August 1, 1933, *i. e.*, \$0.044184 per pound or approximately 4½ cents per pound. [Finding VIII, Tr. p. 143]. At that time, to wit, August 1, 1933, Pacific Company held for sale or other disposition articles processed wholly or in chief value from cotton, which articles, consisting of tires, fabrics, threads and other materials, had a total content of 782,474 pounds of processed cotton. Accordingly Pacific Company pursuant to Section 16 of the Agricultural Adjustment Act prepared and filed with John P. Carter, now deceased, the then Collector of Internal Revenue for the Sixth District of California, its return reporting the sale or other disposition of said processed cotton of 782,474 pounds weight and paid the Collector a tax thereon in the total sum of \$34,648.08, computed at the rate of \$0.044184 per pound. No portion of this tax has at any time been refunded or credited to Pacific Company or to appellant, its successor in interest [Finding IX, Tr. pp. 143-144].

During the period from August 1, 1933, through January 5, 1934, Pacific Company manufactured and sold tires which contained 705,806 pounds of the aforementioned 782,474 pounds of processed cotton which were in the company's inventory on August 1, 1933, and upon which the aforementioned Agricultural Adjustment Act tax had been paid. The balance of the processed cotton was utilized in rubber products other than tires or wasted [Finding X, Tr. pp. 144-145].

In computing the manufacturer's excise tax imposed under Section 602 of the 1932 Revenue Act at the rate of 2¼ cents per pound of tires sold, Pacific Company deducted from the weight of these tires the 705,806

pounds of processed cotton contained therein on which it had paid the Agricultural Adjustment Act tax [Finding XI, Tr. pp. 145-146]. The authority for so doing the Pacific Company found in Section 9a of the Agricultural Adjustment Act (7 U. S. C. A. §609a) which provided as follows:

“Provided, That upon any article upon which a manufacturers’ sales tax is levied under the authority of chapter 20 of Title 26 and which manufacturers’ sales tax is computed on the basis of weight, such manufacturers’ sales tax shall be computed on the basis of the weight of said finished article *less the weight of the processed cotton contained therein on which a processing tax has been paid.*”¹

This computation of the manufacturer’s excise tax, wherein deduction was taken for the weight of processed cotton on which a tax had been paid under Section 16 of the Agricultural Adjustment Act, was disallowed by the Collector and on April 10, 1934, demand was made for additional manufacturer’s excise tax in the amount of \$15,880.64 together with interest thereon in the sum of \$569.74 representing a tax of $2\frac{1}{4}$ cents per pound on the said 705,806 pounds of processed cotton contained in the tires which had been sold. These amounts were paid by Pacific Company under written protest in order to avoid further penalties and interest [Finding XII, Tr. pp. 146-147].

Thereafter and on August 31, 1935, appellant and Pacific Company each filed with Nat Rogan, the then Collector of Internal Revenue for the Sixth District of Cali-

¹The trial court affirmed the right of the Pacific Company to have taken this deduction in computing its manufacturer’s excise tax. [Conclusion of Law I, Tr. p. 153.]

fornia, claims for refund of this additional manufacturer's excise tax and interest thereon, in the aggregate sum of \$16,450.39, urging therein that the above-quoted provision of Section 9a of the Agricultural Adjustment Act permitting the deduction had application not alone to the so-called "processing tax" levied by Section 9a of the Act but to the equivalent and counter-part tax levied under Section 16 of the Act, the so-called "floor-stocks" tax. In the claim for refund filed by appellant it alleged its right to receive the refund by reason of an assignment made to it by the Pacific Company to which we will refer hereinafter [Finding XVIII, Tr. pp. 148-149; Exhibits D and F, Tr. pp. 199-202 and pp. 209-214]. Later, on April 21, 1936, appellant and Pacific Company filed amended claims for refund urging the same ground but affirmatively alleging that the taxpayer did not include the tax, the refund of which was claimed, in the price of the articles on which the tax was imposed nor did it collect it from the persons to whom the articles were sold [Finding XIX, Tr. p. 149; Exhibits E and G, Tr. pp. 204-208 and pp. 215-220].

These claims for refund were rejected by the Commissioner of Internal Revenue on May 22, 1936, the appellant's claims upon the ground that Pacific Goodrich Rubber Company had claimed a refund of the same taxes and that appellant's claims were therefore duplicate claims [Exhibit H-1, Tr. pp. 221-222], and the claims of Pacific Company upon the ground that in the opinion of the Commissioner the proper interpretation of Section 9a of

the Agricultural Adjustment Act did not entitle the company to a credit for floor stocks tax paid under Section 16 of the Act [Finding XX, Tr. pp. 149-150; Exhibit H-2, Tr. pp. 223-224].¹ The instant action to recover this additional manufacturer's excise tax was commenced by appellant on October 1, 1937 [Tr. p. 25].

One other matter of factual background deserves to be noted, constituting as it does one of the two grounds for the trial court's adverse decision. As mentioned above Pacific Goodrich Rubber Company was formally dissolved on December 21, 1934 [Finding I, Tr. p. 141; Exhibit J, Tr. pp. 234-235]. Prior to its dissolution it transferred all its assets, including "all rights, claims and choses in action" which it then had or might thereafter acquire, to its parent company and sole stockholder, the appellant herein. This transfer was evidenced by an assignment made on June 30, 1934 [Finding XVI, Tr. p. 148; Exhibit A, Tr. pp. 191-193], and on July 6, 1934, the board of directors and the stockholders of Pacific Goodrich Rubber Company severally ratified and confirmed the assignment and transfer to appellant of all of the assets of Pacific Company "as a distribution in kind to the stockholders" [Findings XIII and XIV, Tr. p. 147; Exhibits I and I-1, Tr. pp. 226-231]. At the same meetings the dissolution of the company was agreed upon and appropriate resolutions therefor passed [see certified copy of minutes

¹As noted above, the trial court disagreed with the Government's contention in this regard.

of directors and stockholders meetings, Tr. pp. 225-233 and Findings XIII and XIV, Tr. p. 147].

On August 14, 1935, five days before making its claim for refund of the taxes here in suit [Exhibit F, Tr. pp. 209-213], the Pacific Company purported to make a specific assignment of its claim for refund against the United States and appointed appellant its attorney in fact to make claim, demand payment and to prosecute any and all proceedings at law or in equity therefor [Exhibit B, Tr. pp. 194-195].

As will hereinafter appear, the trial court concluded that the right to the refund of the tax here in question was not acquired by appellant by reason of its ownership of all of the stock of Pacific Company or by the dissolution of that company or by the distribution of its assets in kind to its stockholders but vested in appellant by reason of the assignments above mentioned which assignments the court concluded were "absolutely null and void *ab initio* under the provisions of Section 3477 of the Revised Statutes" (31 U. S. C. A. §203), which section has the effect of nullifying except under certain conditions any purported assignment of a claim against the United States [Conclusion of Law V, Tr. p. 155]. The trial court further concluded that appellant had failed to establish that the tax for which refund is sought had not been passed on to its vendees by Pacific Goodrich Rubber Company [Conclusion of Law VII, Tr. p. 156]. Otherwise the trial court properly concluded that the credit upon the manufacturer's excise tax permitted by Section 9(a) of the

Agricultural Adjustment Act above quoted was equally applicable to the so-called "floor stocks" tax imposed by Section 16 of the Agricultural Adjustment Act [Conclusion of Law I, Tr. p. 153], and that the tax, recovery of which is here sought, was "erroneously, illegally and unjustly demanded and collected from the plaintiff's predecessor in interest, the Pacific Goodrich Rubber Company," and that it, as the taxpayer, is entitled to the refund claimed both under the applicable revenue laws and under the equitable remedy of money had and received [Conclusion of Law II, Tr. p. 154].

We address ourselves, therefore, to this court fortified with the knowledge that the appellee has received and now holds \$16,450.38 which it has erroneously and unjustly collected from appellant's predecessor, its wholly owned and now dissolved subsidiary, and which in equity and good conscience belongs to appellant and should be repaid. If we can satisfy this court (a) that the uncontradicted evidence sufficiently shows that the tax was not passed on or, to be more exact, that it was not included in the price of the articles with respect to which it was imposed and (b) that appellant is properly entitled to maintain this action for refund, the judgment of the trial court must be reversed.

Specification of Errors.

Appellant hereby specifies the particulars in which the Findings of Fact, Conclusions of Law and Judgment appearing in the transcript of record herein [Tr. pp. 140-158] are erroneous:

I. The court erred in making and entering its Conclusion of Law V [Tr. p. 155] and in concluding as a matter of law therein that the right to the refund of the tax which is sought to be recovered in this action was not acquired by appellant by reason of its ownership of all of the stock of Pacific Goodrich Rubber Company or by the dissolution of that company or by the distribution in kind by said company of all of its assets to appellant. The court further erred therein in concluding as a matter of law that the right to refund of said tax vested in appellant by reason of the two written assignments, dated respectively June 30, 1934, and August 14, 1935, executed by Pacific Goodrich Rubber Company in favor of appellant, and then concluding that said assignments to the extent they constituted assignments of a claim against the United States were absolutely null and void *ab initio* under the provisions of Section 3477 of the Revised Statutes. That therein said conclusion of law is irreconcilably inconsistent.

II. The court erred in that it wholly failed and refused to make a finding upon the material issue of fact as to whether or not the right to the refund of the manufacturer's excise tax sought to be recovered in this action

was at any time acquired by appellant from the Pacific Goodrich Rubber Company.

III. The court erred in that it wholly failed and refused to make a finding upon the material issue of fact as to whether or not the right to the refund of the said manufacturer's excise tax was assigned, transferred and delivered by the Pacific Goodrich Rubber Company to the appellant on or about June 30, 1934, in anticipation of the immediate dissolution of the Pacific Goodrich Rubber Company and as a distribution in kind of all of the assets of that company to appellant as its sole stockholder, or that said right to refund was assigned, transferred and delivered by the Pacific Goodrich Rubber Company to the appellant on or about August 14, 1935, subsequent to the dissolution of said company and as a distribution in kind of this asset to appellant as the sole stockholder of the dissolved corporation.

IV. The court erred in that it wholly failed and refused to make a finding upon the material issue of fact as to whether or not the right to the refund of the said manufacturer's excise tax, if not acquired by appellant by virtue of said assignments, passed to appellant as the sole stockholder of the Pacific Goodrich Rubber Company upon the dissolution of that company on or about December 21, 1934.

V. The court erred in making and entering its Conclusion of Law VII [Tr. p. 156] and in concluding as a matter of law therein that appellant had failed to establish that the tax, the refund of which is sought by this action,

was not passed on to the vendees or purchasers of the Pacific Goodrich Rubber Company within the requirements of Section 621(d) of the Revenue Act of 1932.

VI. The court erred in that it failed and refused to make a finding upon the material issue of fact as to whether or not Pacific Goodrich Rubber Company in fact included in the price of the tires sold by it from August 1, 1933, to January 5, 1934, on which it had paid a tax under Section 16 of the Agricultural Adjustment Act, any amount to cover any manufacturer's excise tax upon the weight of processed cotton contained therein [Tr. p. 91].

VII. The court erred in failing and refusing to find the following facts for the reason that such facts are ultimate facts supported by competent evidence and there is no finding of fact to the contrary and a total absence of any evidence, competent or otherwise, to support a contrary finding:

That Pacific Goodrich Rubber Company did not include nor did it intend to include in the price of the tires sold by it from August 1, 1933, through January 5, 1934, on which it had paid a tax under Section 16 of the Agricultural Adjustment Act, any amount to cover any excise tax on the weight of processed cotton contained therein [Tr. p. 91].

VIII. The court erred in that it failed and refused to make a finding upon the material issue of fact as to whether or not during the period from August 1, 1933, to April 10, 1934, the prices at which the Pacific Goodrich

Rubber Company sold tires containing processed cotton on which a tax was paid under Section 16 of the Agricultural Adjustment Act were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was paid under Section 9(a) of said Act [Tr. p. 91].

IX. The court erred in failing and refusing to find the following facts for the reason that such facts are ultimate facts supported by competent evidence and there is no finding of fact to the contrary and a total absence of any evidence, competent or otherwise, to support a contrary finding:

That during the period from August 1, 1933, to April 10, 1934, the prices at which the Pacific Goodrich Rubber Company sold tires containing processed cotton on which a tax was paid under Section 16 of the Agricultural Adjustment Act were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was paid under Section 9(a) of said Act [Tr. p. 91].

X. The court erred in sustaining appellee's objection to or in refusing to consider the stipulated testimony of the witness George Hubbell as set forth in the Stipulation of Facts at transcript pages 83-85, 90-92, on the ground that the same was secondary or not the best evidence.

The substance of said testimony was that the books and records of Pacific Goodrich Rubber Company were and are kept under the witness' control and supervision; that

he was familiar with and knew the prices at which tires were sold by Pacific Goodrich Rubber Company and knew whether or not there was included in the price of the tires sold from August 1, 1933, to January 5, 1934, any amount to cover any excise tax on the processed cotton contained in the tires sold during said period [Tr. pp. 84-85] * * * that Pacific Goodrich Rubber Company did not in fact include or intend to include in the price of tires sold by it between August 1, 1933, and January 5, 1934, any amount to cover any excise tax on the processed cotton contained therein and that the prices at which it sold tires during said period on which a "floor stocks" tax had been paid under Section 16 of the Agricultural Adjustment Act were no greater than the prices at which during said period it had sold tires on which a "processing tax" had been paid under Section 9(a) of that Act [Tr. p. 91].

Appellee's objection thereto, made after the conclusion of the trial, appears in its reply brief, the original of which is included in the record on appeal, and reads as follows:

"Plaintiff's only offer of proof consists of the statement of one of its officers (submitted in stipulation form). *The Government objects to the materiality of these statements* on the ground that they are not the best evidence to show that the tax was not passed; that the best evidence consists of the books and records of sales of plaintiff's predecessor." [Tr. p. 263.]

The court's ruling on the objection appears in its opinion, "Conclusions of the Court on the Merits of the Action":

"No books of account or sales records were produced and no explanation for their non-production was made at the hearing, although the Government objected to the sufficiency of the proof that was offered on this crucial factual issue." [Tr. p. 108.]

XI. The court erred in making and entering its following quoted Conclusion of Law VI [Tr. p. 156] for the reason that said conclusion of law is contrary to law:

"That under Sec. 621(d) of the Revenue Act of 1932 only 'the person who paid the tax' can establish the facts required by that section to be established as a condition to the allowance of a refund of such taxes under Sec. 3220 of the Revised Statutes. That the plaintiff is not 'the person who paid the tax' within the meaning of that phrase as used in Sec. 621(d) of the Revenue Act of 1932."

XII. The court erred in denying appellant's motion to reopen the case to admit further proof [Tr. pp. 110-135].

XIII. The court erred in that it abused its discretion in denying appellant's motion to reopen the case to admit further proof [Tr. pp. 110-135].

XIV. That the judgment is contrary to law.

Summary of Argument.

1. The sole stockholder of a dissolved corporation to whom the assets of the corporation have been transferred pursuant to the dissolution is a transferee by operation of law and not within the prohibition of Revised Statutes Section 3477.

2. Where the undisputed evidence shows and the court finds that an additional tax was assessed and collected long after the articles, upon the sale of which it was imposed, have been sold and that the manufacturer and seller did not know or contemplate that the additional tax applied to it and that it did not subsequently bill or collect the additional tax from its vendees, it cannot be said that the evidence does not fairly establish that the additional tax was not added to the price of the articles sold.

3. If it is established that the additional tax was not added to the price of the articles sold it matters not under Section 621(d) of the Revenue Act of 1932 that that fact is established by the successor in interest of the person who paid the tax, particularly when those facts are established by the agent and employee of the corporate taxpayer testifying from its own books and records.

4. When objection is made for the first time after the conclusion of a trial that certain pertinent evidence introduced is not the best evidence and the objection is sustained, it is reversible error for the trial court to deny a motion to reopen to permit the introduction of the primary evidence.

I.

**Appellant as Transferee by Operation of Law and as
Sole Stockholder of the Dissolved Taxpayer Could
Properly Maintain This Action for Refund.**

Initially it is incumbent upon appellant to convince the court of its right in the first instance to prosecute this action for the recovery of taxes paid by its predecessor, Pacific Goodrich Rubber Company.

We have already adverted to the fact that appellant, during all times that the Pacific Company was in existence, owned all of its issued and outstanding capital stock [Findings VI and VII, Tr. pp. 142-143]; we have further remarked that the Pacific Company was formally dissolved on December 21, 1934 [Exhibit J, Tr. pp. 234-235; Finding of Fact I, Tr. p. 141] and that this corporate action was taken pursuant to resolutions of the stockholders [Exhibit I-1, Tr. pp. 229-230] and of the board of directors [Exhibit I, Tr. pp. 226-228]. Pursuant to its impending dissolution the Pacific Company transferred all of its assets to its sole stockholder, the appellant herein, by an assignment dated June 30, 1934 [Exhibit A, Tr. pp. 191-193]. The resolutions directing the dissolution, adopted one week later, expressly confirmed and ratified the assignment "*as a distribution in kind to the stockholders of all the assets of this corporation*" [resolutions of the board of directors, Exhibit I, Tr. p. 228, and resolutions of the stockholders, Exhibit I-1, Tr. p. 230. See, also, resolution of the board of directors adopted August 24, 1934, further expressly ratifying the assignment, Tr. pp. 231-233]. The court found these various components of Exhibit I to be true and correct copies of the minutes of the respective meetings [Findings XIII, XIV and XV,

Tr. p. 147], and by statute certified copies of the minutes of a corporation are themselves *prima facie* evidence "of the facts or action stated therein" (Calif. Civil Code, §371; *People v. Ratliff*, 131 Cal. App. 763, 773; 22 Pac. (2d) 245).

As will appear, it is demonstrably clear that the trial court erred in concluding that the assignment, to the extent it constituted an assignment of a claim against the United States, was "absolutely null and void *ab initio* under the provisions of Sec. 3477 of the Revised Statutes" and, in contradiction thereto, that the right to the refund vested in appellant *by reason of the assignment* and not by reason of its ownership of all the stock of Pacific Company, by the dissolution of that company and by the distribution in kind of all its assets to its sole stockholder, the appellant [Conclusions of Law V, Tr. p. 155].¹ There is no escape from the proposition that the assignment of this claim against the United States was either valid as a transfer by operation of law, to which point we shall address ourselves in a moment, or it was, as the trial court concluded, void and of no effect so far as concerned the claim against the United States, *in which latter case the claim for refund which, by hypothesis it had failed effectively to transfer, remained as an asset of Pacific Company*² and hence passed to appellant, the sole stockholder,

¹Note in this connection our Specifications of Errors Nos. II and III in which we claim error on the part of the trial court in failing to make any finding upon this vital issue as to whether the assignment was or was not in fact a distribution in kind of all of its assets by the taxpayer to its sole stockholder.

²Note, that the effect of Section 3477, Revised Statutes, is such as to make an attempted assignment void *inter partes* as well as void as against the United States. *Spofford v. Kirk*, 7 Otto. 484, 24 L. Ed. 1032, 1034. And the assignor is left in the same position it would have been had no assignment been made. *H. M. O. Lumber Co. v. United States* (D. C. Mich.), 40 Fed. (2d) 544, 545.

on the dissolution of the Pacific Company in December, 1934. Certain it is that the Pacific Company, which has neither *de jure* nor *de facto* existence and is as legally extinct as a dead man,¹ no longer owns its erstwhile claim against appellee. It passed to its stockholder in 1934 either pursuant to the assignment in June (and necessarily if such be the case the assignment could not have been "null and void *ab initio*") or pursuant to the dissolution in December. "When a corporation is dissolved its assets do not vanish and its debtors are not absolved or released." (*Wilner Friends Credit Assn. v. Scheffres*, 175 Misc. 909, 25 N. Y. S. (2d) 664, 666.)

IF IT DID NOT PASS BY THE ASSIGNMENT, THE RIGHT
TO THE REFUND PASSED AUTOMATICALLY TO ITS
STOCKHOLDER ON DISSOLUTION.

Upon dissolution, title to the corporate assets vests automatically and by operation of law in its stockholders.

19 C. J. S., "Corporations," Section 1730, page 1489:

"In the absence of statute, the legal title to property belonging to the corporation passes *by operation of law* to the stockholders, who are the beneficial owners through the corporation, and who take as tenants in common, . . ."

16 *Fletcher Cyc., Corps.* (Perm. Ed.), Section 8134, page 878:

"On dissolution, the legal title to land passes to the stockholders, and title to the corporate property vests in the stockholders as tenants in common and is sub-

¹"Its dissolution puts an end to its existence, the result of which may be likened to the death of a natural person." *Chicago Title & Trust Co. v. Forty One Thirty Six Wilcox Building Corp.*, 302 U. S. 120, 125, 82 L. Ed. 147, 150.

ject to their contract if all debts have been paid and no receiver has been appointed. The sole stockholder in a dissolved corporation has such an interest in its property as may pass by will. Choses in action passing to the stockholders as part of the corporate assets may be enforced by them in their own names."

13 *Am. Juris.*, "Corporations," Section 1352, page 1197:

"Stated in another way, the rule is that after the dissolution of a corporation, its property passes to its stockholders subject to the payment of the corporate debts.

"In accordance with these principles, a dissolution of a private corporation entirely changes the character of the property interest of its stockholders. It destroys their stock as such and under the modern equitable view substitutes the thing which their stock represented—that is, an interest in the corporate property. Indeed, there is ample authority for the doctrine that the stockholders of a corporation, when its existence ceases, become vested with a legal title to its property as tenants in common."

Wells Fargo Bank v. Blair, *Commissioner of Internal Revenue* (9th C. C. A.), 26 Fed. (2d) 532, 534:

"The California courts, construing section 400 of the Code, hold that the trustees have no legal title to the assets of the corporation, but that upon dissolution the legal title to the assets of the defunct corporation is vested in the stockholders."

Gardiner v. Automatic Arms Co. (D. C. N. Y.), 275 Fed. 697, 700:

"Upon dissolution, the legal title of the property of the corporation passes to the stockholders subject to

the payment of the debts of the corporation. *Pewabic Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732; *Stearns Coal Co. v. Van Winkle*, 221 Fed. 590, 137 C. C. A. 314; *Boyd v. Hankinson*, 92 Fed. 49, 34 C. C. A. 197; 14A *Corpus Juris*; *Doherty v. Rice* (C. C.), 186 Fed. 204, 212, affirmed 184 Fed. 878, 107 C. C. A. 202; *Greenwood v. Union Freight R. R. Co.*, *supra*; sections 54 and 84, Corporation Law of New Jersey.”

Pewabic Mining Co. v. Mason, 145 U. S. 349, 356, 36 L. Ed. 732, 734:

“In 1883 the Pewabic Mining Company ceased to exist; its property then belonged to the different stockholders as tenants in common.”

See, also, to the same effect:

Barker v. Edwards (9th C. C. A.), 259 Fed. 484, 488;

Stearns Coal & Lumber Co. v. Van Winkle (6th C. C. A.), 221 Fed. 590, cert. den. 241 U. S. 670, 60 L. Ed. 1230.

And such is the law of Delaware, the state of incorporation of the Pacific Company.

Diamond State Iron Co. v. Husbands, 8 Del. Cr. 205, 68 Atl. 240;

Wilmington & R. R. Co. v. Doxeward (Del. 1888), 14 Atl. 720, 724;

Pontiac Trust Co. et al. v. Newell, 266 Mich. 490, 254 N. W. 178, 181.

In the last cited case it was urged that plaintiff, Nisbett, a principal stockholder of Michigan Refining Works, Inc.,

a Delaware corporation, had not standing in court; page 181:

“Defendants contend plaintiff Nisbett has no standing in court; that the Delaware corporation has been dissolved. Plaintiff Nisbett was the principal stockholder of the Delaware corporation, prior to its dissolution.”

To which the court replied, page 181:

“Dissolution merely has the effect of passing the title of the corporate property, subject to the rights of creditors, to the stockholders, or members of the corporation. *Dissolution of a corporation does not destroy its property. It effects a transfer thereof to those whom the law recognizes as the beneficial owners thereof.* So, if the corporation here involved has been dissolved, plaintiff Nisbett became beneficially interested in its assets and as a person beneficially interested in such assets had a right to invoke the aid of the court for the protection of such property from misappropriation by defendants.”

In *Federal Real Estate etc. Co. and Hugh J. Phillips v. United States*, 79 Ct. Cl. 667, where action was brought against the United States to recover damages for the closing of a right of way in which action the plaintiffs were a dissolved Delaware corporation and its sole stockholder, the court in permitting recovery held that the plaintiff, Phillips, as sole stockholder of the dissolved corporation which had owned the damaged land, was the proper party to sue; page 677:

“The authorities are practically uniform in holding that on the dissolution of a corporation the legal title to the property of the corporation rests in the stockholders. It is true that in most of the cases so

holding the court found that there were no creditors and that in the case at bar no such finding can be made and possibly the presumption is that there were some creditors. We do not think that this alters the rule or prevents a sole stockholder from beginning a suit to recover on a chose in action belonging to the corporation.”

Page 678:

“The legal title to the property which the corporation had in the first instance acquired must be in some party. It cannot be in the corporation, for the corporation having been dissolved by and under the authority of the State, can no longer have title to the property. This seems to be conceded on the part of the defendant. It cannot be in a receiver, for no receiver has been appointed. It cannot be in any creditor, for they have only equitable rights. We think that in the case at bar the legal title must rest in Hugh J. Phillips, who was president and sole stockholder. Having the legal title, it follows that he had the right to commence this suit and could commence it in his own name.”

As the sole party in interest following the dissolution of the Pacific Company and as the owner by operation of law of the right to the claim for refund, it is manifest that even upon the supposition that the assignment was in fact void as in violation of Revised Statutes Sec. 3477, appellant inherited the right to recover the taxes wrongfully collected by defendant by virtue of the dissolution alone, or as was stated in *Morgenthau v. Fidelity & Deposit Co. of Maryland* (U. S. Ct. of Appeals for the Dist. of Col.), 94 Fed. (2d) 632, 636, when a similar

contention was made that an assignment of a claim against the government was void under R. S. Sec. 3477:

“So far as a legal assignment is concerned, much may be said in favor of this contention, but we do not have to pass on this point because R. S. §3477 has never been construed to apply to assignments by operation of law. * * * *Accordingly, we may ignore the assignment by Durso to the surety and regard only the assignment which, on account of the situation of the parties, the law has effected.*”

DISTRIBUTION IN KIND BY A CORPORATION PURSUANT TO DISSOLUTION IS A TRANSFER BY OPERATION OF LAW.

However, be that as it may, it is clear both upon reason and the authorities that the assignment of its assets by Pacific Company under the circumstances as disclosed by the undisputed evidence in this case was not such an assignment as falls within the prohibition of R. S. §3477 (31 U. S. C. A. §203).

It has been uniformly held from the United States Supreme Court to the chief counsel of the Bureau of Internal Revenue¹ that the prohibition against assignment of claims against the United States has no application to assignments by operation of law.

The reasons underlying §3477 of the Revised Statutes were early expressed by Mr. Justice Miller in *Goodman v. Niblack*, 12 Otto 556, 26 L. Ed. 229, 231:

“Those mischiefs, as laid down in that opinion, and in the others referred to, were mainly two:

¹G. C. M. 21058; 1939-1 C. B. part I, p. 280, considered *infra*, pp. 58-59.

"First. The danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction.

"Second. That, by a transfer of such a claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts or the Congress as desperate cases when the reward is contingent on success, so often suggest."

and assignments by operation of law were shown to be without the scope of the dangers sought to be guarded against:

"The language of that statute includes 'All transfers and assignments of any claim upon the United States or of any part thereof or any interest therein.' These words are broad enough, if such were the purpose of Congress, to include transfers by operation of law or by will. Yet in that case we held it did not include transfers by operation of law or in bankruptcy, and we said it did not include a transfer by will. *The obvious reason of this is that there can be no purpose in such cases to harass the government by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim. That in such cases the exigencies of the party who held the claim justified and required the transfer that was made.*"

The assignment on June 30, 1934, of all of the assets of the Pacific Company to its parent and sole stockholder was clearly anticipatory to and in contemplation of its

impending dissolution. If further proof of this fact were needed than the natural inference¹ to be drawn from the fact of distribution of all of its assets to its stockholders within six months of its formal dissolution it is to be found in Exhibit I and I-1 from whence it appears that the ratification of this assignment one week after its date by the board of directors and the stockholders was predicated upon the proposed dissolution and "as a distribution in kind to the stockholders of all the assets of this corporation" [Tr. p. 228, p. 230].² That such a transfer is not within the prohibition of the statute has been repeatedly held by the courts.

Novo Trading Co. v. Commissioner of Internal Revenue (2nd C. C. A.), 113 Fed. (2d) 320, is closely in point. Petitioner was a corporation, all the stock of which was held by three stockholders. By June 22, 1932, all its obligations had been paid and most of its physical assets disposed of. On that date its three stockholders, who were also its only officers and directors, entered into a formal written agreement which recited that they "have agreed to dissolve said corporation and liquidate its affairs" in the manner therein set forth. A certificate of dissolution was executed by the stockholders but was never filed with the Secretary of State with the result that the corporation was not formally dissolved although remaining dormant and inactive. The remaining assets of

¹See *Kenemer v. Commissioner of Int. Rev.* (5th C. C. A.), 96 Fed. (2d) 177, 178, where the court observed (p. 178):

"It is not material that the distribution was not specifically designated as a liquidating dividend or that no formal resolution to liquidate or dissolve the corporation had been adopted when the distribution was made. *An intention to liquidate was fairly implied from the sale of all the assets and the act of distributing the cash to the stockholders.*"

²Note, again, the effect of Calif. Civil Code Sec. 371 making this recital *prima facie* evidence of the facts stated.

the corporation, which included a claim against the United States for refund of illegally collected import duties which the corporation had paid under protest, were by the written agreement referred to, distributed among the three stockholders.

The claim for refund was subsequently allowed in 1934 and a check therefor drawn to the order of the corporation. Question was presented whether this constituted taxable income of the corporation in that year. If the transfer of assets to the stockholders in 1932 included the claim for refund and the transfer was not void to that extent under §3477 of the Revised Statutes the refund would be income of the distributees rather than of the corporation. In reversing an order of the Board of Tax Appeals holding the refund to be income of the corporation, the court stated (p. 321):

“We think it clear that the liquidation agreement was intended to effect a distribution in kind of all the remaining assets of the corporation. Certain assets were allotted to the stockholders severally; the claim for duty refunds was allotted to them jointly. the net proceeds thereof, when collected, to be distributed in equal shares.

* * * * *

“Since they were the only persons having any interest in the remaining corporate assets, there is no reason for not giving effect to their intention to have the agreement operate as an assignment by the corporation.” (Citing cases.)

and the court concluded that the transfer was not within the prohibition of Revised Statutes §3477, page 322:

“It remains to consider whether the transfer is rendered void by the statute in respect to assignment

of claims against the United States, 31 U. S. C. A. §203. *The assignment only passed legal title to parties who already owned the entire beneficial interest in the claim. Such an assignment is not within the evils at which the prohibitions of the statute are directed.* Kingan & Co. v. United States, Ct. Cl., 44 F. (2d) 447; Consolidated Paper Co. v. United States, Ct. Cl., 59 F. (2d) 281; see also Goodman v. Niblack, 102 U. S. 556, 26 L. Ed. 229; Seaboard Airline Ry. v. United States, 256 U. S. 655, 41 S. Ct. 611, 65 L. Ed. 1149; Martin v. National Surety Co., 300 U. S. 588, 594, 57 S. Ct. 531, 81 L. Ed. 822. Hence the assignment was valid and the refund collected in 1934 was not income of the petitioner.”

Strikingly close in point is a recent decision of the District Court in Pennsylvania. *Roomberg v. United States*, 40 Fed. Supp. 621. This was a suit by Roomberg, formerly the sole stockholder of the Ambassador Shirt Company, a corporation, which had ceased doing business in March, 1937, when the plaintiff took over all its assets and assumed its liabilities. In August, 1937, it was formally dissolved and its charter discontinued. During the year 1933 there was assessed against the corporation a floor stocks tax on cotton articles processed wholly or in chief value from cotton, pursuant to the provisions of the Agricultural Adjustment Act. A claim for refund of these taxes was made by the corporation under appropriate provisions of the Revenue Act of 1936, §§902 and 903 (7 U. S. C. A. §§644 and 645) and upon its rejection plaintiff in 1940 instituted this action for recovery of the tax with interest. Motion to dismiss was filed by the government upon the joint ground that under the refund provisions of the 1936 Revenue Act only the person pay-

ing the tax could secure a refund and that the transfer of the claim from the corporation to its stockholder was void under Revised Statutes §3477.

In denying the motion to dismiss the court observed, after quoting from the *Novo Trading Corporation* case above (p. 623):

“In the instant case it is undisputed that Roomberg was the sole stockholder in the corporation, and thus the sole beneficial owner of the assets of the corporation.

* * * * *

“Section 3477 of the Revised Statutes is designed to protect the United States of America against conditions which do not appear to exist in this case. As was clearly stated in the leading early case of *Goodman v. Niblack*, 102 U. S. 556, 560, 26 L. Ed. 229, the Supreme Court of the United States pointed out that the mischiefs designed to be remedied by Section 3477 were mainly two: ‘First, the danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction. Second, that by a transfer of such a claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or the Congress, as desperate cases, when the reward is contingent on success, so often suggest.’ ”

And after quoting from *Kingan & Co. v. United States* and *Seaboard Airline Ry. v. United States*, consolidation

cases to which we shall refer below, the court concluded (p. 625):

“Obviously, in this case, the government has to deal with only one real party in interest and cannot possibly be subjected to any claim by any other source. Substantial justice requires that the motion to dismiss be denied, and accordingly the motion is denied.”¹

ANALOGY OF THE CONSOLIDATION CASES.

Not distinguishable in substance from the dissolution cases above are those cases wherein the transfer of a claim against the government has been incidental to the merger or consolidation of the corporation owning the claim.

Seaboard Airline Railway v. United States, 256 U. S. 655, 65 L. Ed. 1149. Appellant sued in the Court of Claims to recover balances for transportation services originally payable to the Florida Central and Peninsular Railroad Company to whose rights it had succeeded through merger or consolidation. Holding that because of Revised Statutes §3477, appellant could not maintain the action, that court dismissed its petition. In reversing the judgment, the court speaking through Mr. Justice McReynolds stated, page 657 (1150 of 65 L. Ed.):

“We cannot believe that Congress intended to discourage, hinder, or obstruct the orderly merger or consolidation of corporations as the various states might authorize for the public interest. There is no probability that the United States could suffer injury

¹See in this connection *Western Knitting Mills v. United States*, 2 Fed. Supp. 119, 126, cert. den. 290 U. S. 639, 78 L. Ed. 556, wherein the taxpaying corporation was held estopped from asserting a claim against the United States for recovery of taxes overpaid which had been refunded to its sole stockholder and successor in interest.

in respect of outstanding claims from such union of interests, and certainly the result would not be more deleterious than would follow their passing to heirs, devisees, assignees in bankruptcy, or receivers, all of which changes of ownership have been declared without the ambit of the statute. The same principle which required the exceptions heretofore approved applies here.”

Phillips, Collector of Internal Revenue v. Lyman H. Howe Films Co. (3rd C. C. A.), 33 Fed. (2d) 891. In this action to recover corporate income taxes overpaid by a corporation subsequently merged into the plaintiff company the court observed pertinently, page 892:

“Without discussing the speculative question as to just when and how the rights, liabilities, and properties of the merging companies passed to the merged one, it suffices to say that in the relation of taxpayer and government it is clear that the same shareholders, the same subject-matter, and the several rights and liabilities of taxpayer and government continued in unbroken continuity from the time the government wrongfully collected the tax until the taxpayer brought this suit. The merger was a permissible proceeding under the state law. It introduced no new parties; it was a mere readjustment of relation of the original shareholders among themselves. *The wrong done those shareholders by the unjust collection of the taxes from one of the merging companies continued to be a wrong suffered by them as shareholders of the merged company.* Regarding substance and not mere corporate form, it is clear to us that the filing of the required statutory waiver was the right of the shareholders of the merged corporation.”

Kingan & Co. Inc. v. United States, (Ct. Cl.), 44 Fed. (2d) 447. Kingan & Co. Limited, a British corporation, had a claim for refund for taxes overpaid the United States in 1917. In 1920 the plaintiff, a domestic corporation, was formed to take over and operate all properties in the United States of the English company, the stockholders of which became the stockholders of the new company. Following its incorporation formal written assignment was made to the new company of all assets of Kingan & Co. Limited located in the United States. In permitting the new company to prosecute the claim for refund of taxes paid the court stated, page 451:

“The facts in this case are strikingly analogous to those which gave rise to the case of the Seaboard Airline Railway v. United States, *supra*. After the reorganization in this case, the same stockholders were in control of the plaintiff as were in control of Kingan & Co., Limited, and their stockholdings in the two companies were in the same proportion. *In substance therefore there was really no transfer of the subject-matter of the claim in question, for, although the bare legal title to the claim might have passed from Kingan & Co., Limited, to the plaintiff under the deeds referred to in the facts, the equitable ownership of the claim at all times reposed in the same individuals, that is, in the hands of the same stockholders.* Clearly, no fraud could be perpetrated upon the Treasury in a transaction of this kind. All of the reasons advanced in *Seaboard Airline Railway v. United States*, *supra*, are alike applicable here, for certainly Congress did not intend to discourage or obstruct an orderly reorganization under the laws of the various states any more than it intended to discourage and obstruct orderly merger or consolidation

of corporations under these laws. *There is also no probability that the United States could suffer injury in respect of outstanding claims from such a reorganization as is brought about by the facts in this case, and the result would not be more deleterious than would follow the claim passing to heirs, devisees, assignees in bankruptcy, or receivers. Accordingly, we are of opinion that the plaintiff is entitled to maintain this suit."*

Of like effect are the following additional cases:

Monarch Mills v. Jones, Collector of Internal Revenue (D. C. So. Car.), 56 Fed. (2d) 180, 183, aff'd 59 Fed. (2d) 502;

Consolidated Paper Co. v. United States (Ct. Cl.), 59 Fed. (2d) 281, 288, cert. den. 288 U. S. 615, 77 L. Ed. 988;

Western Pacific Railroad Co. v. United States, 268 U. S. 271, 275, 69 L. Ed. 951, 953;

G. C. M. 21085, 1939—1 C. B. part I, p. 280—
Opinion of Chief Counsel, Bureau of Internal Revenue.

The assignment of June 30, 1934, of all the assets of the Pacific Company to its sole stockholder anticipatory to the dissolution of the taxpayer is clearly not such a transfer as falls within the prohibition of R. S. §3477.¹

It may be argued, however, that the assignment being made prior to dissolution, notwithstanding the recital of

¹As a corollary, note that the government in turn can recover unpaid corporate taxes from the stockholders to whom the corporation assets have been distributed on dissolution. *Wander Bakeries Co. v. United States* (Ct. Cl.), 6 Fed. Supp. 228, 233; *Phillips v. Commissioner of Internal Revenue*, 283 U. S. 589, 592, 75 L. Ed. 1289, 1294.

the resolutions of the board of directors and of the stock holders to the contrary, was not in fact a "distribution in the resolutions of the board of directors and of the stockholders" pursuant to dissolution but was an attempted voluntary assignment having no relation to the subsequent dissolution.¹ If such be the contention then assuredly the assignment [Exhibit B, Tr. pp. 194-195] made on August 14, 1935, of this particular claim for refund (as if to resolve any doubt about its having passed under the 1934 general assignment) was unqualifiedly a distribution of this asset in kind to appellant, the sole stockholder of the then dissolved taxpayer corporation.

Lest it be lost sight of in the discussion of the technical niceties as to whether the appellant acquired its right to maintain this action under one or other of the assignments or *ex proprio vigore* by the dissolution of the Pacific Company, we again reiterate the basic fact that the appellee has in its possession \$16,450.39 which, as found by the trial court [Tr. pp. 148, 154], was wrongfully collected and which by necessary hypothesis belongs to either a corporation which has had no existence in law or in fact for some eight years past or to the appellant, its transferee and sole stockholder. The result of the trial court's decision in this respect is to stultify and render meaningless its conclusion that the additional tax was "erroneously, illegally and unjustly demanded and collected from plaintiff's predecessor in interest" [Conclusion of Law II, Tr. p. 154] for the taxpayer being now extinct and having, moreover, hitherto transferred its claim, the government will necessarily retain its improper gains if the judgment stands.

¹Note again the language of the court in *Kenemer v. Commissioner of Int. Rev.* (5th C. C. A.), quoted *supra* at p. 26.

II.

The Uncontradicted Evidence Establishes That the Tax Was Not Added to the Price of the Tires With Respect to the Sales of Which It Was Imposed.

As a second ground for its decision adverse to the appellant the trial court concluded that appellant had failed to establish that the tax, the refund of which is here sought, was not passed on¹ to the vendees or purchasers of the Pacific Goodrich Rubber Company within the requirements of Section 621(d) of the Revenue Act of 1932 [Conclusion of Law VII, Tr. p. 156].

The section in question, which is part of the chapter of the 1932 Act imposing a manufacturer's excise tax provides, so far as is here pertinent:

"No overpayment of tax under this chapter shall be credited or refunded * * * in pursuance of a court decision or otherwise, unless the person who paid the tax establishes * * * that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of the tax from the vendee."

The reason for the limitation, which is a frequent one in the Revenue Laws,² is apparent: a taxpayer would be unjustly enriched if he were permitted to recover taxes paid to the Government, the amount of which he had already passed on to his vendees;³ hence the duty is cast

¹We again emphasize that the criterion to be applied is not, under Sec. 621 (d), whether the tax was "passed on" but whether or not it was included "in the price of the article with respect to which it was imposed."

²See Section 424 of the 1928 Revenue Act and Section 902 of the 1936 Revenue Act (7 U.S.C.A. § 644), the latter relating to refunds of taxes paid under the Agricultural Adjustment Act.

³*Anniston Mfg. Co. v. Davis, Collector*, 301 U. S. 337, 81 L. Ed. 1143; *United States v. Jefferson Electric Mfg. Co.*, 291 U. S. 386, 78 L. Ed. 859.

upon him, as a condition precedent to recovery, of establishing that the tax has not been passed on to others.

Preliminarily, it may be observed that the conclusion of the court that appellant had not sustained this burden is not based upon any conflict in the evidence nor was there any evidence or finding by the court that the additional manufacturer's excise tax assessed against the Pacific Company was in fact passed on.¹ The conclusion of the trial court complained of was simply that the evidence adduced did not sustain the affirmative fact that the tax had not been passed on.² That the trial court erred in so concluding we believe can be conclusively proven.

The articles upon which the floor-stocks tax was paid, the weight of the cotton content of which the Pacific Company deducted in computing its manufacturer's excise tax, were all sold by it between August 1, 1933, and January 5, 1934 [Findings X and XI, Tr. pp. 144-146]. Notice of the rejection of this method of computation of its manufacturer's excise tax and the disallowance of the deduction it had taken was not given until April 10, 1934 [Finding XII, Tr. p. 146], *after the Pacific Company had sold the articles on which it paid the tax and before it had notice of the additional assessment*. A more perfect case of the manifest impossibility of the tax in question having been "included in the price of the article with respect to which it was imposed," it would be difficult to conceive, *where not until after the sales had been concluded was the seller apprised that they carried the additional tax*.

¹Note in this connection, likewise, our Specification of Errors Nos. VI, VII, VIII and IX in which we claim that the trial court erred in failing to make any finding upon this issue.

²This does not call upon the appellate court to review the evidence or to settle conflicts therein but rather to determine the legal significance to be given to the facts adduced. *Campana Corp. v. Harrison* (7th C.C.A.), 114 Fed. (2d) 400, 406; *United States v. Jefferson Electric Mfg. Co.*, *supra*.

Nor are we prostituting the truth in the guise of logic: the evidence showed [Tr. pp. 90-92] and the court found [Finding XXII, Tr. pp. 151-152]:

“That throughout the period from August 1, 1933, to April 10, 1934, the Pacific Goodrich Rubber Company was informed and believed that, for the purpose of computing the manufacturer’s excise tax on tires manufactured and sold by it, it was entitled under the provisions of Sec. 9 (a) of the Agricultural Adjustment Act to deduct from the weight of the tires so sold the weight of the processed cotton contained therein upon which a tax had been paid either under Sec. 9 (a) or Sec. 16 of the Agricultural Adjustment Act; that Pacific Goodrich Rubber Company and plaintiff at all times prior to said April 10, 1934, believed that the tax burden with respect to such tires would amount to \$0.044184 on the processed cotton contained in said tires and $2\frac{1}{4}$ cents per pound on the remaining weight of said tires; *that at no time during the period preceding April 10, 1934, did Pacific Goodrich Rubber Company or plaintiff contemplate that Pacific Goodrich Rubber Company or plaintiff would be compelled to pay an additional manufacturer’s excise tax of $2\frac{1}{4}$ cents per pound on the weight of the processed cotton contained in said tires and on which had been paid a floor stocks tax under Sec. 16 of the Agricultural Adjustment Act. That all tires containing processed cotton which was held for sale or other disposition by the Pacific Goodrich Rubber Company on August 1, 1933 were sold and billed to the purchasers or vendees of the Pacific Goodrich Rubber Company long before demand was first made upon said company that it pay an additional manufacturer’s excise tax of $2\frac{1}{4}$ cents per pound on the weight of the processed cotton contained in said tires,*

and that after said additional tax had been demanded and paid no additional billing was made to said purchasers or vendees and no additional amount collected from them."

In further support of the fact that the tax was not passed on to the vendees of the tires with respect to the sale of which the additional tax was imposed is the uncontradicted and stipulated evidence

"that the prices at which Pacific Goodrich Rubber Company sold said tires during said period, containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act, were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was payable under Section 9-a of the Agricultural Adjustment Act." [Tr. p. 91.]¹

The question as to whether or not under many varying circumstances the manufacturer has adequately sustained his burden of proving that the tax has not been passed on has been before the United States courts on many occasions but never to our knowledge has it been held that the taxpayer has not sufficiently established his absorption of the tax where his liability for the payment of it was not known or contemplated at the time of sale.

In *Campana Corporation v. Harrison* (7th C. C. A.), 114 Fed. (2d) 400, where refund was sought of an addi-

¹Hence, demonstrating that the tires with respect to which the additional tax was subsequently assessed and paid carried no greater margin of profit at the time of their sale than those tires as to which no question existed of the manufacturer's right to deduct from its manufacturer's excise tax the weight of cotton on which the "processing" tax, as opposed to the "floor stocks" tax, had been paid under Section 9-a of the Agricultural Adjustment Act.

tional manufacturer's excise tax, the court, in affirming the trial court's finding that the additional tax had not been passed on, remarked (p. 407):

"The July, 1933, invoices only represented that the \$8.80 figure represented the selling price, but as a matter of fact the accounting records and taxpayer's admission show that the original tax (or 13¢ in this instance) was collected from the wholesalers. Nor could the invoices have represented that the \$8.80 figure represented an 80¢ or 67¢ tax, for the additional tax (67¢ in this instance) was not assessed until two years later and hence could not have been collected before that time."

Page 408:

"If the taxpayer here had collected an 80¢ tax from the Sales Company and then the Sales Company had represented to the wholesalers that the \$8.80 price included an 80¢ tax, then taxpayer would not be heard denying that a portion of the price represented 80¢ tax. But the truth of the matter is that the additional tax (*i. e.*, 67¢ in this instance) was neither assessed until two years later nor then collected by the taxpayer from the Sales Company or the wholesalers."

In *Skinner v. United States* (D. C., Ohio), 8 Fed. Supp. 999, another suit for recovery of illegally collected manufacturer's excise taxes, the court, in awarding judgment for plaintiff, observed (p. 1004):

"Not only is there the sworn testimony of plaintiff to this effect, but an analysis of the exhibits attached to the stipulation, (Exhibit No. 1) having particular reference to the correspondence back and forth between plaintiff and his representatives and the Com-

missioner of Internal Revenue, *shows almost conclusively that plaintiff, in the nature of things, could not and would not have added any sum to be paid by the vendees, to be later applied by plaintiff in the payment of taxes, for the reason that before February 7, 1933, the plaintiff had been, as shown by Plaintiff's Exhibits 1-B and 1-E, repeatedly assured that there was no tax by him to be paid on his retreaded tires.* The first notice that plaintiff had of a ruling by the Commissioner that he was liable for a tax on retreaded tires was the letter to him from the Commissioner dated February 7, 1933 (Exhibit No. 1-F)."

Page 1005:

"The tax assessed in the instant case was for the taxable period covered by the month of February, 1933, to wit, from February 1, 1933, to February 28, 1933, inclusive. Certainly up until February 7, 1933 (and it appears most probable not until after the end of that period, to wit, February 28, 1933), there had been no final indication to plaintiff herein that the article which he was selling would be subject to any tax, and consequently it would seem that, when plaintiff testifies that he has not included the tax in the price of the article and has collected nothing by way of this tax from his vendees during the period in question, his statement should be taken as true and correct in the light of the circumstances as they existed at the time."

In *Con-Rod Exchange, Inc. v. Henricksen* (D. C., Wash.), 28 Fed. Supp. 924, an action for the recovery of an additional manufacturer's excise tax assessed against plaintiff, the court permitted recovery where it was shown

that the additional tax for which refund was sought was not in contemplation when the sales were made (p. 927):

“The evidence shows that the sales of rebabbitted rods were made at prices fixed by larger competitors who published, regularly, price lists. * * * An executive officer of the plaintiff testified positively that at no time was the price fixed by himself or anyone connected with the company so as to include the tax.

“Some of the price lists which the plaintiff sought to meet show that the particular competitor had included the excise tax in the price. There is no showing that plaintiff was aware of that fact. But even if there were, it could not be held to outweigh the positive statements that a possible excise tax *was not in contemplation* when the price was fixed.” (Italics by the court.)

While not strictly cases of *impossibility* of the tax having been included in the price of the articles sold because the sales were made both before and *after* the tax was claimed, the following decisions, where contracts of sale were made before the manufacturer learned it was subject to the excise tax and thereafter continued to sell at the same contract price, are pertinent.

Einson-Freeman Co. v. Corwin, Collector of Int. Rev. (D. C., N. Y.), 29 Fed. Supp. 98, 99; rev'd. on grounds of the Statute of Limitations, 112 Fed. (2d) 683:

“The plaintiff contends that it first learned that the government claimed the tax in February, 1933. After the plaintiff was apprised of the fact that the government claimed a tax on the jigsaw puzzles, it did not increase the price of the puzzles because of the terms of the contract of November 30, 1932. It is clear that the tax was not passed on to the vendee.”

University Distributing Co. v. United States
(D. C., Mass.), 22 Fed. Supp. 794, 799:

“It was on April 4, 1933, that the Commissioner notified the petitioner that jigsaw or cardboard die cut picture puzzles containing more than 50 pieces were considered games and ‘subject to the tax as imposed by Section 609 of the Revenue Act of 1932.’ The terms of the petitioner’s contract with its sole distributor were not changed in consequence of this ruling, and the tax here involved was not included in the price of the article sold or collected from the vendee.”

We thus contend, and we believe most reasonably and justifiably, that the requirement of Section 621(d) that no overpayment of tax shall be refunded *unless the person who paid the tax establishes that he has not included the tax in the price of the article with respect to which it was imposed or collected the amount of tax from the vendee* was, and both upon reason and the authorities must have been, satisfied by the evidence and the court’s affirmative finding thereon *that the additional tax, the refund of which is sought, was not assessed against or contemplated by the taxpayer until long after the articles with respect to which it was imposed had been sold and disposed of and “that after said additional tax had been demanded and paid no additional billing was made to said purchasers or vendees and no additional amount collected from them.”* [Finding of Fact XXII, Tr. pp. 151-152.]

By very hypothesis the additional tax could not under such circumstances have been included “in the price of the article with respect to which it was imposed” and the amount thereof was not, as found by the court, collected from the vendees later.

ANY EVIDENCE FROM THE BOOKS AND RECORDS OF THE
TAXPAYER WAS UNNECESSARY IN VIEW OF THE
EXTRINSIC CIRCUMSTANCES SHOWING THAT THE
SALES PRECEDED KNOWLEDGE OF THE TAX.

In the face of the unequivocal and favorable finding above discussed it may be idle to speculate upon the reasons for the court's adverse conclusion that the appellant had failed to establish that the additional tax was not passed on to the vendees or purchasers of the Pacific Goodrich Rubber Company [Conclusion of Law VII, Tr. p. 156]. Presumably it is to be found in the opinion of the trial court [set forth in the record at Tr. pp. 95-108] wherein it is stated that the only evidence that the tax was not passed on was in the form of a stipulation that the auditor of the Pacific Company would, if called as a witness, testify that he was familiar with its books and with the prices at which tires were sold by the taxpayer and that the price of tires sold during the period August 1, 1933, to January 5, 1934, did not include any excise tax on the processed cotton contained in the tires. The court observed in its opinion:

“No books of account or sales records were produced and no explanation for their non-production was made at the hearing, although the Government objected to the sufficiency of the proof that was offered on this crucial factual issue.” [Tr. p. 108.]¹

¹It is curious to observe that the court was willing to rely on the auditor's stipulated testimony rather than the books and records as sufficient proof of other matters found to be true; as, for example, that no additional billing was made to the vendees of the Pacific Company after the tax was paid and no additional amount collected from them [*cf.* Tr. pp. 92 and 152], or that the 705,806 pounds of processed cotton on which the excise tax was assessed were part of the 782,474 pounds of cotton on which the floor stocks tax had been paid [*cf.* Tr. pp. 88 and 145.]

It is probable that the court was misled by the language of those decisions representative of the more usual situation, namely, attempts to recover refunds of taxes which were in effect and leviable at the time of the sales which gave rise to them. In such a case,¹ where the taxpayer is cognizant of the tax attaching to his proposed sale and where there is every likelihood of his having included it in his price and passed it on to his vendee, he may be put to stringent proof, from his sales records, records of cost and books of account, to establish that he has in fact absorbed the tax himself. Accordingly, we believe, the trial court may have lost sight of the fact that the additional tax in this instance *could not* in the very nature of things have been included "in the price of the article with respect to which it was imposed" for the simple reason that it had not then been demanded or assessed when the articles were sold and further because the taxpayer, as found by the court, was informed and believed that it was not liable for payment of any additional tax [Finding of Fact XXII, Tr. pp. 151-152]. That one circumstance alone, when established as it was in this case, made any further proof from the books or records of the taxpayer unnecessary and redundant unless, contrary to all the evidence, the court arbitrarily indulged the unwarranted assumption that the taxpayer included in the price of its tires a tax *which it was informed and believed it was not called upon to pay, which it did not contemplate paying*²

¹As, for example, claims for refund of processing taxes under the Agricultural Adjustment Act following the adjudication of its unconstitutionality; *Anniston Mfg. Co. v. Davis*, *supra*.

²"that at no time during the period preceding April 10, 1934, did Pacific Goodrich Rubber Company or plaintiff contemplate that Pacific Goodrich Rubber Company or plaintiff would be compelled to pay an additional manufacturer's excise tax of 2¼ cents per pound on the weight of the processed cotton contained in said tires and on which had been paid a floor stocks tax under Section 16 of the Agricultural Adjustment Act." [Finding of Fact XXII, Tr. pp. 151-152.]

and which was not demanded and which it did not pay until long after the articles "with respect to which it was imposed had been sold."

NO OBJECTION WAS RESERVED OR MADE TO THE
STIPULATED TESTIMONY.

However, forgetting for a moment the force of this argument, the trial court was still in error in concluding that the stipulated testimony of the taxpayer's auditor as to what its books would reflect was insufficient and that the plaintiff should have offered the books themselves in evidence.

As we have stated, all the evidence other than certain documentary exhibits took the form of a written stipulation [see Tr. pp. 80-92]. While there was reserved a right on the part of the government to object to the materiality or relevancy of the stipulated facts, there was no reservation of a right to object to any of the stipulated testimony upon the ground of incompetency or that it was not the best evidence.¹ The transcript reflects the following oral stipulation [Tr. pp. 189-190]:

"Mr. Blanche: If it please the Court, at this time I propose to offer a stipulation of facts in this matter which has been signed by counsel for the Government and counsel for the petitioner, the plaintiff.

"By stipulation of counsel for the Government, there will be no question of a foundation raised.

¹The reservation of the right to object to the *sufficiency* of the proof made is meaningless, going as it does to the quantum of the proof rather than the quality of the evidence. A cause of action can be sufficiently proved by incompetent evidence if no suitable objection thereto is made. *Paine v. Willson* (8th C.C.A.), 146 Fed. 488, 492; *American Surety Co. v. Scott* (10th C.C.A.), 63 Fed. (2d) 961, 964; 23 Corpus Juris. "Evidence," § 1783, p. 39.

However, there may be raised, either at this time, or at the time of the filing of the brief, *a question regarding, or questions regarding, the materiality of the facts stipulated to, the relevancy of the facts stipulated to and of the sufficiency of the proof made.*

"We appreciate that the latter may always be raised, but in order that there be no misunderstanding we make that statement.

* * * * *

"This stipulation, if the Court please, takes two forms. The first form is a stipulation as to ultimate facts, these having to do with items that are not denied in the first amended petition. The second takes the form that if two particular witnesses were called they would testify as set forth in the stipulation.

"Is that a correct statement, Mr. Jewell—

"Mr. Jewell: *That is a correct statement.*

"The Court: I suppose that the stipulation that they would so testify is also made subject to the materiality and relevancy of that evidence.

"Mr. Blanche: Yes, Your Honor."

That no right to object on the ground of competency of the evidence was reserved is illustrated by the companion stipulation made respecting the government's proof:

"Mr. Blanche: If the Court please, I believe that we may have a stipulation from counsel for the Government to the effect that the materiality and the relevancy of the exhibits introduced by the Government, *not as to the competency*, may be raised at any time.

"Mr. Jewell: So stipulated." [Tr. pp. 257-258.]

The objection, which made its appearance for the first time in the Government's reply brief, to bring itself within the reservation of the stipulation attempted to cloak itself in the guise of an objection to the *materiality* of the stipulated testimony rather than its competency as secondary evidence. In the reply brief it was stated:

"Plaintiff's only offer of proof consists of the statement of one of its officers (submitted in stipulation form). *The Government objects to the materiality of these statements* on the ground that they are not the best evidence to show that the tax was not passed; that the best evidence consists of the books and records of sales of plaintiff's predecessor." [Tr. p. 263.]

It is thus apparent that no right to object to the stipulated testimony upon the ground that it was not the best evidence was reserved in the stipulation,¹ that no appropriate or timely objection on that ground was made at all, and that the first intimation of the objection appearing as it did in the government's trial brief left appellant without the opportunity of offering the original evidence of the books and records themselves (assuming it to have been necessary which we dispute). A subsequent motion on the part of appellant to reopen to introduce this original evidence was denied and error of the court in so ruling is made the subject of our fourth point in this brief.

¹And there was very good reason as this case fittingly illustrates: A timely objection to competency will permit the party to produce other and competent evidence. See Point IV below. An objection going to relevancy or materiality does not presuppose the power to cure it with other alternative evidence.

PROPER OBJECTION MUST BE TAKEN TO EXCLUDE
SECONDARY EVIDENCE.

The best evidence rule does not exclude secondary evidence unless objection is made upon that precise ground.

Kansas City S. R. Co. v. C. H. Albers Commission Co., 223 U. S. 573, 56 L. Ed. 556, 567.

“The uncontradicted testimony of witnesses likely to be informed on the subject disclosed the existence of an applicable lawful rate on the northern line from Omaha to Kansas City. True, this testimony was not the best evidence, but, being offered and admitted without objection, it was evidence which could not be disregarded.”

Roberts v. Graham, 6 Wall. 578, 18 L. Ed. 791, 792:

“If parol evidence be received without objection, to prove the contents of a record, it is sufficient for that purpose. *Newberry v. Lee*, 3 Hill, 533. In *McMicken v. Brown*, 6 Mart. (N. S.) 86, the defendant made no objection to the introduction of the testimony, but *prayed the court to instruct the jury that it was insufficient to warrant a verdict against him*. The jury found for the plaintiff. It was held by the appellate court that *he should have objected to the admission of the evidence and that, not having done so, he was concluded by the verdict*. The judgment was affirmed.”

Burton v. Driggs, 20 Wall. 125, 22 L. Ed. 299, 301;

American Surety Co. of New York v. Scott (10th C.C.A.), 63 Fed. (2d) 961, 963;

United States v. Aluminum Co. of America (D. C., N. Y.), 35 Fed. Supp. 820, 826;

Jones on Evidence (3rd Ed.), § 202, p. 291;

23 *Corpus Juris*, "Evidence," § 1783, p. 39.

This is similarly the rule in the California courts which, pursuant to Rule 43 of the Federal Rules of Civil Procedure, governs actions in the United States Court.

People v. One Ford V-8 Coach, 21 Cal. App. (2d) 445, 449; 69 Pac. (2d) 473;

Goode v. Smith, 13 Cal. 81, 84;

McCornish v. Kaufman, 43 Cal. App. 507, 510, 185 Pac. 476;

Eversdon v. Mayhew, 85 Cal. 1, 10; 21 Pac. 431;

St. Vincent's Inst. v. Davis, 129 Cal. 20, 23; 61 Pac. 477;

2 *Cal. Jur.*, § 473, p. 804;

10 *Cal. Jur.*, § 137, p. 858.

EVEN IF SECONDARY THE EVIDENCE WAS ADMISSIBLE
UNDER THE RULE RELATING TO SUMMARY EVIDENCE.

However, even had objection to the stipulated testimony of the auditor [Tr. pp. 83-88, 90-92] been reserved and timely and properly made, it would not have been well taken. It was stipulated that the witness in question, George Hubbell, was the auditor and cashier of the Pacific Company [Tr. p. 84]; that he kept its books and records [Tr. p. 85] and knew whether or not there was included in the price of the tires sold by Pacific Company during the period from August 1, 1933, to January 5, 1934, any

amount to cover any excise tax on the processed cotton contained therein (on which processed cotton a tax had already been paid under the Agricultural Adjustment Act [Tr. p. 85]), and that, in fact, there was not included in the price of the tires any amount to cover any excise tax on the weight of processed cotton therein [Tr. p. 91].

As stated in *Burton v. Driggs*, *supra*, at p. 302 of 22 L. Ed.:

“When it is necessary to prove the results of voluminous facts, or of the examination of many books and papers and the examination cannot be conveniently made in court, the results may be proved by the person who made the examination. I Greenl. Ev., sec. 93.”

Stephens v. United States (9th C.C.A.), 41 Fed. (2d) 440, 444; cert. den. 282 U. S. 880, 75 L. Ed. 777:

“It was not incumbent upon the prosecution to introduce the books in evidence. Such requirement would be fundamentally inconsistent with the reasons underlying the rule that qualified accountants may testify to computations, deductions, or summaries where the material facts to be shown can be ascertained only by the inspection of a large number of documents or the analysis of complicated accounts.”

United States v. Kelley (2nd C. C. A.), 105 Fed. (2d) 912, 918;

Rowland v. Boyle, 244 U. S. 106, 108, 61 L. Ed. 1022, 1023;

Jones on Evidence (3rd Ed.), § 206, p. 299;
Annotation 66 A. L. R. 1206.

This likewise is the rule of evidence in California.

Code of Civil Procedure, § 1855 (5);

People v. Dole, 122 Cal. 486, 496; 55 Pac. 581;

Pacific Paving Co. v. Gallett, 137 Cal. 174, 176;
69 Pac. 985;

Globe Mfg. Co. v. Harvey, 185 Cal. 255, 261; 196
Pac. 261;

Kinney v. Maryland Cas. Co., 15 Cal. App. 571,
574, 115 Pac. 456.

THE STIPULATED TESTIMONY WAS IN FACT PRIMARY EVIDENCE.

But was the stipulated testimony of Mr. Hubbell in fact secondary rather than primary evidence? He was the auditor and cashier of the Pacific Goodrich Rubber Company and testified from his own knowledge that the price of the tires sold during the period in question did not include any amount to cover any excise tax on the processed cotton contained therein [Tr. p. 91]. Who was in a better position to know this fact and to testify to it than the auditor and cashier? And is the assumption (for it is no more than an assumption of the Government's counsel and the trial court) warranted that the inclusion or noninclusion of this tax (which had not yet been assessed or demanded) in the price of the tires sold could only have been proved by the books and records of the company? We think not. Compare *R. Hoc & Co. v. Commissioner of Internal Revenue* (2d C.C.A.), 30 Fed. (2d) 630, where petitioner was called upon to establish that certain moneys paid to it by the government on reconversion of its plant from wartime to peacetime operation was no more than the actual cost thereof to the company and hence was improperly included as taxable income.

Kelly, the vice president who was in charge of petitioner's business during the reconstruction period, testified that he knew that the losses and expenses incident to the reconversion were greater than the \$324,000 which was paid by the Government. It was held to be error for the Commissioner and the Board of Tax Appeals to have stricken this testimony "upon the ground that the books are the best evidence and that it rests entirely in the witness' opinion," page 634:

"The objection that the books were the best evidence was clearly insufficient, for they were not necessary at all as a part of the taxpayer's proof. * * * The testimony of Kelly was not secondary evidence. *Central Commercial Co. v. Jones-Dusenbury Co.* (C.C.A.), 251 F. 13. If it was not sufficiently specific, the objection should have been taken for that reason, so that the taxpayer could elaborate it further. *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299. The witness was a person who, more than any one else, knew the facts and could estimate the expense and loss. We cannot say that his uncontradicted statement that there were expenses greater than the payment made should go for nothing, * * *

In *Central Commercial Co. v. Jones-Dusenbury Co.* (7th C.C.A.), 251 Fed. 13, the court stated, p. 16:

"As appears from the contract, defendant contracted with plaintiff for the product of A. E. Turner & Co., and only that. The defense interposed was that plaintiff undertook to work off upon defendant rosin of other manufacturers. To refute this charge plaintiff, among other evidence, introduced the testimony of the two alleged best qualified witnesses, who swore unqualifiedly to the statement that no rosin but that manufactured by Turner & Co. within the

conditions named in the contract was delivered by plaintiff to defendant, nor was any other included in the rosin involved in this suit. * * *

“Defendant now raises the point that plaintiff had better evidence as to the rosin manufactured by Turner & Co., viz. a certain book alleged to contain records of the daily production and all other rosin manufactured by Turner & Co. during the contract period, which, defendant insists, should have been introduced in evidence on the trial as being the best evidence of such production.

“The contention is, to say the least, novel. The evidence introduced was in no sense secondary. It was primary in its nature. There was no denial of it. It may be that defendant could have found in the production records some better data for cross-examination, or evidence more conclusive to its counsel’s mind, but the proposition that the rule requiring the production of the best evidence applies to circumstances and conditions such as here prevail does not commend itself to us.”

And in cases involving the identical question here in issue, whether the incidence of a tax has been passed on, oral evidence has been held competent and sufficient.

C. B. Cones & Son Mfg. Co. v. United States (7th C.C.A.), 123 Fed. (2d) 530, 533:

“Its general manager testified that the vendees would not stand for the addition of the tax and that it was not included in any other sales.”

Marchand Co. v. Higgins, Collector of Internal Revenue (D. C., N. Y.), 36 Fed. Supp. 792, 794:

“There is a condition precedent to recovery which is imposed by statute on the plaintiff. Section 621(d)

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of the Revenue Act of 1932, 26 U. S. C. A. Int. Rev. Code, § 3443(d), places a burden on the taxpayer who seeks to recover manufacturer's excise taxes to show that the tax has not been passed on to the trade. Testimony to this effect was given by Mr. Brooks, a witness for the plaintiff. The defendant interposed no contradictory evidence on this score. I hold that the plaintiff sustained the burden of proof imposed by statute. *Biermann v. Shea*, D. C., 28 F. Supp. 213."

Duradene Co. v. Magruder, Collector of Internal Revenue (D. C., Md.), 21 Fed. Supp. 426, 431; aff'd. 95 Fed. (2d) 999:

"As to this, I find from the testimony that the plaintiff did not pass on the tax but itself sustained its burden. This is the categorical statement of the principal officer of the plaintiff not shaken by cross-examination or other circumstances."

Biermann v. Shea (D. C., N. Y.), 28 Fed. Supp. 213, 216:

"The presumption relied upon by the government was rebutted by the plaintiff by uncontradicted evidence that he absorbed or bore the burden of the tax."

Ney v. United States (D. C., Va.), 33 Fed. Supp. 554, 557:

"The fact remains that we have the testimony of a very considerable number of credible witnesses employed in and exercising a certain amount of authority in the various departments of the plaintiffs' store and each of these witnesses has testified with positiveness that they remember the occasion of the imposition of this tax because of the duties imposed upon them in ascertaining the amount thereof, and who testify with equal positiveness that there was no increase in prices of any article as a result of this tax or following it

and that the tax was not passed on to the consumer in the shape of any increase in prices or otherwise; that the sales policy of the store and its prices were in no way altered in any respect; and there is no contradiction of these statements whatsoever and no evidence introduced which tends in any way to discredit them. Under the circumstances, the court would have to adopt the arbitrary attitude of disbelieving these witnesses, which it does not do, and where there is no evidence to justify such disbelief, in order to hold that there has been no proof on the part of the plaintiffs of the claim which they have made, namely, that they paid this tax themselves and in no way passed any part of it on to the consumer."

Con-Rod Exchange, Inc. v. Henricksen, 28 Fed. Supp. 924, 927:

"An executive officer of the plaintiff testified positively that at no time was the price fixed by himself or anyone connected with the company so as to include the tax."

Summarizing then this second point of our brief, we urge error on the part of the trial court in concluding that appellant failed to establish that the additional tax was not passed on, first and principally because in the very nature of things consistent with the court's Finding XXII the tax *could not* have been included in the price of the articles with respect to which it was imposed; second, if this erroneous conclusion is based upon the fact that the stipulated testimony of the auditor was not the best evidence and that the books of Pacific Company should have been introduced, the court doubly erred because no appropriate objection to the stipulated testimony was reserved or made and in any event such evidence under the authorities is unobjectionable and sufficient.

III.

A Transferee of "the Person Who Paid the Tax" May Establish the Facts Required To Be Shown by Section 621(d) of the 1932 Revenue Act.

Closely related to both the first and second points argued in this brief was the third and final ground, as reflected in the conclusions of the trial court, for its judgment adverse to appellant. We have shown above that the circumstances under which appellant acquired its right to pursue this action for recovery of the additional manufacturer's excise tax, which the trial court found to have been wrongfully and illegally collected, was not such as to fall within the prohibition of R. S. § 3477 and that hence, as successor in interest of the taxpayer, appellant could properly maintain this action for refund; we have similarly shown that in view of the facts found by the court appellant must necessarily have established that the additional tax was not included "in the price of the article with respect to which it was imposed" (Section 621(d) of the 1932 Revenue Act) and the court itself affirmatively found that the taxpayer had not "collected the amount of the tax from the vendee" later [Section 621(d); Finding XXII, Tr. p. 152]. The trial court, however, in its Conclusion of Law VI [Tr. p. 156] concluded that under Section 621(d) only "the person who paid the tax" can establish the facts required to be shown, namely, that the tax had not been passed on, and that appellant was not "the person who paid the tax."

At first blush this legal nicety is somewhat disconcerting as it would effectively prevent every transferee by operation of law from maintaining action for the recovery of manufacturer's excise taxes notwithstanding the undisputed fact, concurred in by the Bureau of Internal Revenue

itself (G. C. M. 21058, 1939-1 C. B. part I, p. 280) that an assignee by operation of law is not within the prohibition of R. S. § 3477. We cannot bring ourselves to believe that this court will concur in so literal and narrow a construction of Section 621(d) as to prohibit recovery of illegally collected or erroneously paid manufacturer's excise taxes by receivers, by trustees in bankruptcy, by executors, administrators, or by any successor in interest through operation of law simply because Section 621(d) is so worded as to lend itself to the possible interpretation that "the person who paid the tax" must *himself* establish that the tax has not been included in the price of the article sold. The purpose to be effected by the limitation of Section 621(d) we have mentioned above (p. 35), and clearly both Congressional intent and the Bureau of Internal Revenue¹ will be satisfied *if it is established* that the person who paid the tax has not included the tax in the price of the article with respect to which it was imposed or that he has not collected the amount of the tax from the vendee, and this irrespective of from whom the requisite proof may emanate.

Though the exact question has not been previously decided we are not without the aid of valuable precedents under analogous statutes.

Section 902 of the Revenue Act of 1936 (7 U.S.C.A. § 644) makes provision of refunds of taxes paid under the Agricultural Adjustment Act; it provides: "No refund shall be made or allowed, in pursuance of court decision or otherwise, of any amount paid by or collected from any claimant as tax under this chapter, unless *the claimant*

¹See discussion below of G. C. M. 21058, reported in 1939-1 C. B. part I, p. 280 and note that this ground of the decision was not urged by the government here but was the brain child of the trial court itself.

establishes * * * (a) That *he* bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly.”

Section 903 of this Act (7 U.S.C.A. § 645) provides “No refund shall be made or allowed of any amount paid by or collected from *any person* as tax * * * unless a claim for refund has been filed by *such person*, etc.”

It will be noted that these limitations, like that of Section 621(d), purport to require the *personal* proof and *personal* claim of the taxpayer, but it has nevertheless been held that an assignee by operation of law can recover thereunder upon establishing the requisite proof.

In *Roomberg v. United States*, 40 Fed. Supp. 621, the identical question was raised where the sole stockholder of a dissolved corporation sought recovery of floor stocks taxes paid under the Agricultural Adjustment Act. The government contended that:

“under Sections 902 and 903 refunds can be made only to the person paying the tax, and that the tax was paid by the corporation and not by Roomberg individually.”

The court, as noted above, denied the motion to dismiss and held that inasmuch as Roomberg was the sole beneficial owner of the assets of the corporation he was in effect the taxpayer.

In G. C. M. 21058, 1939-1 C. B. part I, p. 280, J. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, rendered an opinion as to whether or not an assignee by operation of law, in that case a reorganized corporation, could recover processing taxes paid by its pre-

decessor in interest. After observing that an assignee by operation of law did not fall within the prohibition of R. S. § 3477, the opinion goes on to state, page 281:

“The question remains as to whether a proper claim for refund has been filed in this case.

“Section 903 of the Revenue Act of 1936 provides that ‘No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person * * *.’ *The person who paid the tax in this case was the M Company. However, that company, if still in existence, has neither interest nor title to the claim for refund. The N Company ‘stands in the shoes’ of the M Company, having acquired all right, title, and interest in the claim against the Government. In National Foods, Inc., v. United States (82 Ct. Cl., 627, 13 Fed. Supp. 364, certiorari denied October 12, 1936) it was held that the assignor of a claim against the Government (which claim had been transferred by operation of law) was not the proper party to maintain a suit to recover on the claim. It is held in the present case that the N Company is the proper party to file the refund claim.*”

This manifestly sound opinion of the Bureau adheres to the doctrine of those decisions holding that the term “taxpayer” or “person paying the tax” should be given a liberal interpretation to include the transferee of a taxpayer. The language of the Second Circuit Court of Appeals in *Olsen v. Helvering*, 88 Fed. (2d) 650, might well be paraphrased to fit this case. It was there held that a notice of deficiency which under Section 272(a) of the

Revenue Act of 1928 (26 U.S.C.A. § 272), the Commissioner was required to address to the "taxpayer" was sufficient though addressed to the decedent rather than to his administrator, the technical "taxpayer." Said the court, page 651:

*"This being true, we are unwilling to construe even a tax statute in the archaic spirit necessary to defeat this levy; the notice is only to advise the person who is to pay the deficiency that the Commissioner means to assess him; anything that does this unequivocally is good enough."*¹

Burnet, Commissioner of Internal Revenue v. San Joaquin Fruit & Investment Co., decided by this court in 52 Fed. (2d) 123, similarly held that notices of deficiency mailed to a dissolved corporation, San Joaquin Fruit Company, were not insufficient as against its transferee and successor in interest, San Joaquin Fruit & Investment Company. As transferee and in fact the sole stockholder of the dissolved corporation (see p. 125), this court held that under Section 280 of the Revenue Act of 1926 (26 U.S.C.A., §1069(a)(1)) it would be liable for the tax liabilities of its predecessor in interest and as such was in fact the real as well as the apparent taxpayer, and concluded, page 128:

"In the instant case the transferee, the taxpayer in fact and in law, received the notice of deficiency in the tax of the transferee's predecessor. The transferee's own pleadings clearly show that such notice

¹By like token this court might well hold that it was unwilling to construe Section 621(d) in the archaic spirit necessary to defeat this refund; the limitation is only to avoid unjust enrichment and to establish that the tax has not been passed on; anything that establishes this unequivocally is good enough whether it be established by "the person who paid the tax" or by others.

conveyed the necessary information; namely, a deficiency in the tax, for which the transferee was sought to be held liable, and was in fact and in law liable. The mere failure so to designate the transferee is not fatal, nor does it deprive the Board of Tax Appeals of its jurisdiction over the proceedings and to determine the issues there involved.

“In view of the Supreme Court’s liberal attitude toward this statute as a remedial measure, we do not feel inclined to deny the Government its right to collect its taxes merely because it failed to label the transferee as such.”

United States v. Updike, 281 U. S. 489, 74 L. Ed. 984, presented the same question in the guise of the application of the statute of limitations. Said the court, page 494:

“Indeed, when used to connote payment of a tax, it puts no undue strain upon the word ‘taxpayer’ to bring within its meaning that person whose property, being impressed with a trust to that end, is subjected to the burden. Certainly it would be hard to convince such a person that he had not paid a tax.”

Of similar import is *United States v. Markowitz* (D. C., Cal.), 34 Fed. Supp. 827, where the court held, page 830:

“There is no reasonable basis to assume that Congress, in using the word ‘Taxpayer,’ intended to exclude the transferee of the assets of a taxpayer and liable for the tax as such, from the provisions of a portion of the statute, thereby creating a shorter statutory period for the commencement of an action for the tax against him than is provided for the commencement of the action against the taxpayer himself.”

In *Phillips v. Commissioner of Internal Revenue* (2nd C.C.A.), 42 Fed. (2d) 177, affirmed 283 U. S. 589, 75 L. Ed. 1289, the question was presented a little differently. Delinquent corporate income taxes of a dissolved corporation were assessed against Phillips, one of its eleven stockholders as "transferee" under Section 280 of the 1926 Revenue Act (26 U.S.C.A. § 311). When he sought to appeal from the decision of the Board of Tax Appeals it was urged that inasmuch as the right of review given under Section 1001 of the Revenue Act of 1926 (*cf.* 26 U.S.C.A. § 1142) is restricted only to the Commissioner or the "taxpayer" and petitioner was not the taxpayer, the court had no jurisdiction. In disposing of this contention the court said, page 179:

"The precise point now under consideration was discussed in *Routzahn v. Tyroler*, 36 F. (2d) 208 (CCA. 6), and we agree with the view there expressed that the statutory definition of 'taxpayer' (26 USCA § 1262) is not seriously inaccurate as applied to a transferee. This view finds added support in the language of the Supreme Court in *United States v. Updike*, 50 S. Ct. 367, 369, 74 L. Ed. 984."

To the same effect see:

Routzahn v. Tyroler (6th C.C.A.), 36 Fed. (2d) 208; cert. den. 281 U. S. 734, 74 L. Ed. 1149;

Commissioner of Internal Revenue v. New York Trust Co. (2d C.C.A.), 54 Fed. (2d) 463, 465; cert. den. 285 U. S. 556, 76 L. Ed. 945;

White v. Hopkins (5th C.C.A.), 51 Fed. (2d) 159, 162-163;

Skaneateles Paper Co., 29 B. T. A. 150, 154.

Without the quotation from or citation of further authorities it is apparent that such phrases in the Revenue Acts as "taxpayer," "person subject to the tax" or "person who paid the tax" are not, unless reason and the context so require, inelastic terms but include and properly include the real party in interest whether or not that person falls within the technical designation of "the person who paid the tax."

THE PHRASE "PERSON WHO PAID THE TAX" IN SECTION 621(d) HAS BEEN HELD TO INCLUDE OTHERS THAN THE ACTUAL TAXPAYING ENTITY.

It is not without considerable interest to note that set in another context the phrase "the person who paid the tax" as contained in Section 621(d) of the 1932 Revenue Act has been construed to include not only the technical taxpayer but also its corporate affiliate. It will be recalled that the section prevents the recovery of a refund unless "*the person who paid the tax* establishes * * * that *he* has not included the tax in the price of the article with respect to which it was imposed."

In *Bourjois, Inc. v. McGowan, Collector of Internal Revenue* (D. C., N. Y.), 12 Fed. Supp. 787, affirmed 85 Fed. (2d) 510, action was brought to recover additional manufacturer's excise taxes collected from plaintiff. Plaintiff utilized wholly owned subsidiary sales corporations through whom it distributed its products and while plaintiff's sales price to its subsidiaries did not include any additional amount for the tax, the sales corporations did collect the tax from their purchasers. In short, while

“the person who paid the tax” did not include the tax in its prices its subsidiaries did. In dismissing the action the court stated, page 793:

“It is to be assumed, therefore, that the prices now charged by the sales corporations include an amount equal to the tax computed on the selling price of the sales corporations, which price has been determined to be the selling price of the plaintiff, the manufacturer. * * * Bourjois, Inc., itself has not collected the additional tax. The sales corporations have. *The effect is the same as though plaintiff had collected it.*

“Section 621(d) of the Revenue Act of 1932, 26 U.S.C.A. §1481 note, provides: ‘No overpayment of tax * * * shall * * * be refunded * * * unless the person who paid the tax establishes * * * (1) that he has not included the tax in the price of the article, * * * or (2) that he has repaid the amount of the tax to the ultimate purchaser.’ The purchaser having paid the tax, the plaintiff sustained no loss. *United States v. Jefferson Electric Mfg. Co.*, 291 U. S. 386, 54 S. Ct. 443, 78 L. Ed. 859.”

In *Campana Corporation v. Harrison* (7th C.C.A.), *supra*, where sales were made through a subsidiary selling corporation and the parent manufacturing company paid the manufacturer’s excise tax for the refund of which that action was brought, it was necessary for the court to find that neither the taxpayer *nor the selling corporation* passed on the tax, page 408:

“We conclude therefore that there is evidence showing that neither the taxpayer nor the Sales Company passed on the additional tax of \$3,121.72.”

And see to the same general effect:

Albrecht & Son v. Landy, Collector of Internal Revenue (8th C.C.A.), 114 Fed. (2d) 202;

Ayer Co. v. United States (Court of Claims), 38 Fed. Supp. 284;

Andrew Jergens Co. v. Connor (D. C., Ohio), 31 Fed. Supp. 61.

If thus the affiliated selling corporation may be treated as “the person who paid the tax” within the meaning of that phrase in Section 621(d) in determining whether the incidence of the tax has been passed to the ultimate buyer no different connotation can be given the phrase when the parent and successor in interest seeks to establish under the same section that the tax has not been included in the price of the articles sold. We reiterate that to hold otherwise as did the trial court in its Conclusion of Law VI [Tr. p. 156] would effectively preclude the refund or recovery of illegally collected manufacturer’s excise taxes by trustees in bankruptcy, receivers, executors, administrators or any such similar successors in interest by operation of law.

As “the person who paid the tax” is now dissolved and no longer in being and hence not available as a witness for the appellant, the words of Mr. Chief Justice Hughes in *Anniston Mfg. Co. v. Davis, Collector of Internal Revenue*, 301 U. S. 337, 352, 81 L. Ed. 1143, 1153, are not inappropriate:

“When the Congress requires the claimant, who has paid the invalid tax, to show that he has not been reimbursed or has not shifted its burden, the provision should not be construed as demanding the performance of a task, if ultimately found to be in-

herently impossible, as a condition of relief to which the claimant would otherwise be entitled. There is ample room for the play of the statute within the range of possible determinations."

THAT THE ADDITIONAL TAX WAS NOT IN FACT PASSED ON WAS IN FACT ESTABLISHED BY "THE PERSON WHO PAID THE TAX."

Let us, however, approach the matter from another point of view for a moment. Is it in fact true, assuming our initial premise that appellant as successor in interest of the taxpayer is not prohibited from maintaining this action, that "the person who paid the tax" has not in truth established the facts required by Section 621(d) to be established? The "person who paid the tax" in this instance is, or was, a corporation which can act only through its officers and agents. George Hubbell, whose testimony was stipulated, testified that he "was an agent and employee of Pacific Goodrich Rubber Company, to wit, the cashier and/or auditor of said company" [Tr. p. 84]. He also testified from his knowledge of the books of that company and to the facts that those books and records would disclose. While the witness was not at the time of trial an agent and employee of the Pacific Company, the taxpayer, because of its dissolution several years previously, the net result of the evidence adduced was identically the same as though the Pacific Company itself had then been in existence and Mr. Hubbell, its auditor and cashier, had testified as agent of the corporate taxpayer to the end of establishing the facts required by Section 621(d), to wit, that the additional tax had not been included in the price of the articles with respect to which it was imposed.

If, as the trial court concluded [Conclusion of Law II, Tr. p. 154], the refund of this additional manufacturer's excise tax, which was "erroneously, illegally and unjustly demanded and collected from the plaintiff's predecessor in interest," can be prosecuted under the equitable remedy of money had and received,¹ it argues strange for a court of equity to deny relief upon the sole ground that "the person who paid the tax" had not *itself* established the necessary facts when those facts were, by hypothesis, established by one of its own officers testifying from its own records.

SECTION 621(d) RELATES ONLY TO THE MATTER OF REQUISITE PROOF; THE RIGHT OF RECOVERY FROM THE GOVERNMENT IS FOUND IN OTHER STATUTES WHICH DO NOT LIMIT REFUNDS ONLY TO THE PERSON PAYING THE TAX.

Not to be overlooked is the fact that Section 621(d) goes only to the requisite proof to be made before a refund can be had, it does not confer the right to a refund of taxes erroneously or illegally collected. The *right of recovery* and the authority of the Commissioner to refund such erroneously or illegally collected taxes is to be found in Revised Stats. § 3220,² I. R. C. § 3770(a)(1) (26

¹Thus in its opinion the trial court stated:

"We also incline very strongly to the conclusion that, apart from the right of the taxpayer to a refund of the wrongfully demanded and collected excess taxes under the applicable revenue laws, the record before us entitles the taxpayer to the refund under the equitable remedy of money had and received. See *Bull, Executor, v. United States*, 295 U. S. 247; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, at page 350." [Tr. p. 101.]

²See *Dodge v. Osborn*, 240 U. S. 118, 60 L. Ed. 557; *Haskins Bros. & Co. v. Morgenthau* (U. S. Ct. of App.), 85 Fed. (2d) 677, 684, Cert. denied 299 U. S. 588, 81 L. Ed. 433; *White v. Hopkins* (5th C.C.A.), 51 Fed. (2d) 159, 161; *Karno-Smith Co. v. Maloney, Collector, etc.* (3rd C.C.A.), 112 Fed. (2d) 690, 692.

U.S.C.A. § 3770(a)(1)) which, it will be noted, does not restrict the Commissioner of Internal Revenue to the making of refunds only to the taxpayer¹ but in general terms authorizes the Commissioner "to remit, refund and pay back all taxes erroneously or illegally assessed or collected." There being no limitation as to the particular person to whom refund is to be made, it is implicit in the statute that it shall be made to the person lawfully entitled thereto, in this instance not the dissolved taxpayer but its assignee and successor in interest.

Going as it does then only to the method of proof and not to the right of recovery, we reiterate, first, that the requirements of Section 621(d) are satisfied if *it is established* (and not necessarily only by "the person paying the tax") that "the person paying the tax" has not included the tax in the price of the article with respect to which it was imposed; second, that the phrase "the person who paid the tax" includes and has been interpreted to include transferees by operation of law and closely held corporate affiliates; and, third, that in reality it was in fact "the person who paid the tax" who established by testimony of its agent and employee the necessary facts required by Section 621(d).

¹As is the case with respect to refunds of income, war-profits or excess profits taxes. See I. R. C. § 322(a) which authorizes refunds "to the taxpayer."

IV.

**In Refusing Appellant the Right to Reopen Its Case
to Introduce Further Proof the Trial Court
Abused Its Discretion.**

The decision from which this appeal has been prosecuted was adverse to appellant upon three distinct grounds: that appellant acquired its right to the refund by assignment from the Pacific Company and that the assignments were void under Rev. Stats. § 3477; that appellant had not sufficiently established that the additional tax was not passed on to the vendees of Pacific Company; and that in any event Pacific Company as "the person who paid the tax" was the only one under the terms of the statute who could establish that the tax had not in fact been included in the price of the tires with respect to which it was imposed.

Not one of these grounds of decision was urged by either the Commissioner of Internal Revenue when the respective claims for refund were rejected or by the Government at or before the trial or at any time until after its conclusion. The asserted invalidity of the assignments and the limited construction placed upon Section 621(d) of the 1932 Revenue Act were in fact points not advanced by the appellee at all and appeared for the first time in the written opinion of the trial court.

The conclusion of the court that appellant had failed to establish that the additional tax had not been passed on to the vendees of the Pacific Company within the requirements of Section 621(d) of the Revenue Act of 1932, was apparently bottomed upon the fact that "no

books of account or sales records were produced and no explanation for their nonproduction was made at the hearing" [Opinion of the trial judge, Tr. p. 108].

The testimony as to whether the Pacific Company had or had not included the additional tax in the price of the tires it had previously sold with respect to which sales the additional tax was subsequently assessed (a supposition manifestly absurd on the face of it) took the form of a written stipulation as to what the auditor and cashier of the taxpayer, who kept its books and records and knew their contents, would testify if called as a witness [Tr. pp. 83-86, 90-92]. No right was reserved in the stipulation or elsewhere to object to the competency of this testimony as secondary or not the best evidence and no proper objection on that ground was in fact made.

Not until it filed its reply brief [Tr. p. 263] following the conclusion of the trial [Tr. p. 261] was the point raised that this stipulated testimony was not material because "not the best evidence to show that the tax was not passed." The ruling of the court, if such it may be termed, upon this objection was made for the first time in its opinion¹ ["Conclusion of the Court on the Merits of the Action," Tr. pp. 95-108] rendered December 31, 1940.

Shortly thereafter and on February 3, 1941, some six months before the making and entry of judgment in the cause [Tr. p. 158], appellant moved to reopen the case to admit further proof [Tr. pp. 110-135]. It was urged as a first ground therefor:

"that no right was reserved in the defendant to object to the testimony set forth in the stipulation of facts

¹Because the ruling of the court on the objection there first appears, the opinion was included in the transcript of the record.

on the ground that it was not the best evidence and that plaintiff and its counsel were not aware of any misunderstanding or basis for misunderstanding of counsel with reference thereto and did not anticipate that said stipulation made in open court would or could be construed by the court to permit the defendant to object to such testimony on the ground that it was not the best evidence." [Tr. p. 112.]

In support of the motion was an affidavit, amongst others, of George Hubbell that he could and would show from the books of account and records of Pacific Company, its invoices, inventory records, manufacturing records, sales records and cost records that his testimony as set forth in the Stipulation of Facts filed in the cause was in all respects true and correct and from which records he could show that the tax was not passed on to the vendees of Pacific Company [Tr. pp. 129-130]. The court on April 15, 1941, denied the motion to reopen to admit further proof [Tr. pp. 139-140] and on August 4, 1941, judgment was entered in favor of the Government.

In view of the fact that it was not until after the conclusion of the trial, at a time when appellant was precluded from remedying the supposed defect, that objection was first taken to the testimony in support of appellant's case, it was manifest error on the part of the trial court to refuse appellant the right to reopen to introduce the books and records themselves if these constituted the only source of evidence the trial court was willing to consider.

When the trial judge after submission of a case concludes that material and necessary testimony which has been offered is not competent he should reopen the case of his own motion to admit further proof.

Paine v. St. Paul Union Stockyards Co. (8th C.C.A.), 28 Fed. (2d) 463, where in reversing the trial court it was said, page 467:

“Here the only evidence pointed to a contrary conclusion than that reached. To some of it when offered there was no objection. If that evidence was not competent, it was nevertheless received and the case submitted with that evidence in. It was vital to the defense. If after the submission of the case and when it was under advisement the trial judge concluded that it was not competent, on his own motion he should have reopened the case to give the defendants an opportunity to present competent evidence. *They would have had that opportunity had this testimony been excluded at the trial. To exclude it after the conclusion of the trial, when there was no longer any opportunity to supply the omission, was to make possible a serious miscarriage of justice, and was error.*”

Amsinck & Co. v. Springfield Grocer Co. (8th C.C.A.), 7 Fed. (2d) 855, 858:

“If it was not a final judgment, then the case remained on the docket, and the court would have the power at the next term, in the exercise of its judicial discretion, to reopen the case for the purpose of receiving newly discovered evidence, or any other purpose consonant with justice and a correct decision, and unless there was clear abuse of such discretion the appellate court will not interfere.”

In *Hormel v. Helvering, Commissioner of Int. Rev.*, 312 U. S. 552, 85 L. Ed. 1037, the Supreme Court, in remanding a cause to the Board of Tax Appeals to take

further evidence upon the question at issue, stated, page 557 (p. 1041 of 85 L. Ed.):

“Rules of practice and procedure are devised to promote the ends of justice, not to defeat them.
* * * Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.”

Arkwright Mills v. Commissioner of Int. Rev.
(4th C. C. A.).¹

Appeal was taken from the Processing Tax Board of Review for error on the part of the Board in rejecting plaintiff's offered testimony to prove that the increased margin of profit it enjoyed in the tax period was attributable to a greater demand for its cotton goods than to the passing on of the processing tax. In reversing and remanding the cause, the court said:

“The evidence was rejected simply on the ground that in the judgment of the Board it was not the type of proof required by the statute to rebut the statutory presumption. In this action there was error. The statute permits the use of any evidence which is pertinent to the questions to be determined. The evidence offered was pertinent and possessed of probative force, and would have justified a finding in the claimant's favor.”

The general rule with reference to the reopening of a case to admit of further proof is thus stated in 64 Corpus Juris. “Trial,” § 179, page 158:

“A motion to reopen a case for the purpose of introducing further evidence in the cause is addressed

¹This decision has not yet appeared in the reports and the correct citation will be given in our reply brief. The decision can be found in 1941 Prentice-Hall, Federal Tax Service, Volume IV, ¶61,036.

to the sound discretion of the court, the exercise of which is not subject to review, unless there has been an abuse thereof. *The discretion is to be liberally exercised in behalf of allowing the whole case to be presented, for the best advancement of the ends of justice.* While the exercise of the court's discretion should not be hampered by unreasonable conditions, such discretion is judicial and not arbitrary. It should be reasonably exercised so as not to injure the opposite party through surprise or otherwise, *and so as not to deprive either party of the opportunity to introduce material evidence."*

While we by no means concede or even imply that the evidence which was adduced was either insufficient or incompetent satisfactorily to establish that the additional tax had not been added to the price of the tires with respect to the sale of which the extra tax was assessed, we do urge that to the extent the trial court's adverse decision was predicated upon the insufficiency or incompetency of the evidence to establish this fact it erred in not permitting appellant to further prove, if necessary, this vital fact from the books and records themselves if those constituted the only evidence the trial court was willing to entertain.

Conclusion.

In conclusion, it is the appellant's earnest contention that the judgment of the trial court in this cause should be reversed for the errors to which we have adverted: that appellant was not prohibited by § 3477 of the Revised Statutes from prosecuting this action; that it was necessarily and sufficiently established that the additional manufacturer's excise tax was not, and in fact could not have

been, included in the price of the tires upon the sales of which the extra tax was subsequently assessed and collected; and, that if this fact was sufficiently established, it matters not that it was proved by appellant rather than by the dissolved taxpayer itself. Finally, that if the trial court felt that the original records were necessary to satisfy it that the amount of the tax had not been added to the price of the tires sold, it erred in refusing appellant the opportunity to produce this other evidence.

When it is recalled that in the language of the trial court itself [Conclusion of Law II, Tr. p. 154] the appellee has “erroneously, illegally and unjustly demanded and collected” \$16,450.39 from appellant’s wholly owned and now dissolved subsidiary, the tenuous grounds upon which the judgment for the government was based crumble under the weight of reason, the authorities and the equities, all of which unanimously demand that the judgment of dismissal be reversed.

Respectfully submitted,

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APPENDIX.

Section 602, Revenue Act of 1932 (26 U. S. C. A. §3400: "There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:

"(1) Tires wholly or in part of rubber, $2\frac{1}{4}$ cents a pound on total weight (exclusive of metal rims or rim bases), to be determined under regulations prescribed by the Commissioner with the approval of the Secretary."

Section 621(d), Revenue Act of 1932 (26 U. S. C. A. §3343(d)): "No overpayment of tax under this chapter shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund."

Section 626, Revenue Act of 1932 (26 U. S. C. A. §3448):

"(a) Every person liable for any tax imposed by this chapter other than taxes on importation shall make monthly returns under oath in duplicate and pay the taxes imposed by this chapter to the collector for the district in which is located his principal place of business or, if he has no principal place of business in the United States,

then to the collector at Baltimore, Maryland. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.

“(b) The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 6 per centum per annum from the time when the tax became due until paid.”

Act May 12, 1933, Chapter 25, Title I, §16 (7 U. S. C. A. §616(a)): “Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:

“(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date. * * *

“(2) Whenever the processing tax is wholly terminated, (A) there shall be refunded or credited in the case of a person holding such stocks with respect to which a tax under this chapter has been paid, or (B) there shall be credited or abated in the case of a person holding such stocks with respect to which a tax under this chapter is payable, where such person is the processor liable for the

payment of such tax, or (C) there shall be refunded or credited (but not before the tax has been paid) in the case of a person holding such stocks with respect to which a tax under this chapter is payable, where such person is not the processor liable for the payment of such tax, a sum in an amount equivalent to the processing tax which would have been payable with respect to the commodity from which processed if the processing had occurred on such date:"

Act May 12, 1933, Chapter 25, Title I, §9(a) (7 U. S. C. A. §609(a)): "To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that any one or more payments authorized to be made under section 608 of this title are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning to the marketing year therefor next following the date of such proclamation; * * * The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that all

payments authorized under section 608 of this title which are in effect are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: *Provided, That upon any article upon which a manufacturers' sales tax is levied under the authority of chapter 20 of Title 26 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished articles less the weight of the processed cotton contained therein on which a processing tax has been paid.*"

Revised Statutes §3477, 31 U. S. C. A. §203:

"§203. Assignments of claims void. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share, thereof, except as provided in section 204 of this title, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assign-

ment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors."

Section 902, Revenue Act of 1936 (7 U. S. C. A. §644) :

"No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under this chapter, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 648 of this title, as the case may be—

"(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of this chapter, or in the price of any article processed from any commodity with respect to which a tax was imposed under this chapter, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof."

Section 903, Revenue Act of 1936 (7 U. S. C. A. §645):

“No refund shall be made or allowed of any amount paid by or collected from any person as tax under this chapter unless, after June 22, 1936, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under this chapter, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.”

Revised Statutes §3220 (26 U. S. C. A. §3770(a)(1)):

“§3770(a)(1): Except as otherwise provided by law in the case of income, estate, and gift taxes, the Commissioner, subject to regulations prescribed by the Secretary, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected.”

No. 10035.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE B. F. GOODRICH COMPANY, a corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California.

BRIEF FOR THE UNITED STATES.

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FILED

AUG 13 1942

PAUL P. O'BRIEN,
CLERK

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No. 10035.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE B. F. GOODRICH COMPANY, a corporation,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The only previous opinion in this case is the memorandum opinion of the District Court, together with that included in the court's findings of facts and conclusions of law [R. 95-108, 140-156], which are not reported.

Jurisdiction.

This is an appeal from a judgment entered August 4, 1941, by the United States District Court dismissing the action, with costs, in favor of the appellee (hereafter called the United States or the Government) [R. 157-158] in a suit¹ filed by the appellant (hereafter called the taxpayer)

¹Appellant filed the present action pursuant to original and amended claims for refund filed by it and its predecessor in interest (the Pacific Goodrich Rubber Company) [R. 9-14, 16-20, 60-64, 67-72, 199-220], the appellant's wholly owned subsidiary [R. 82, 142-143], which assigned its claims against the United States to the appellant. [R. 3-5, 35-38, 52-56, 191-196.] All of the claims were rejected by the Commissioner of Internal Revenue in due course [R. 21, 72, 221-225], and this action followed.

for the recovery of additional manufacturers excise taxes and interest thereon in the aggregate amount of \$16,450.39, plus interest according to law, assessed against and paid under protest by the Pacific Goodrich Rubber Company, the taxpayer's predecessor in interest, for the months of November and December, 1933. [R. 2-25.] The action arose under the internal revenue laws of the United States (Section 602 of the Revenue Act of 1932, c. 209, 47 Stat. 169, as modified by Section 9(a) of the Agricultural Adjustment Act, c. 25, 48 Stat. 31), jurisdiction having been vested in the United States District Court under Section 24, subdivisions 5 and 20 of the Judicial Code. The case is brought to this Court by notice of appeal filed November 3, 1941. [R. 170.] The jurisdiction of this Court is invoked by virtue of the provisions of Section 128(a) of the Judicial Code, as amended.

Questions Presented.

1. Whether the assignments of its claims for refund against the United States made by the Pacific Goodrich Rubber Company, the taxpayer's predecessor in interest and its wholly owned subsidiary, were valid, or ineffective under Section 3477, Revised Statutes.

2. Whether the taxpayer is entitled to maintain the present action and to recover a refund since the grounds relied upon in the claims for refund and the original petition differ materially from the new and unrelated grounds relied upon in the present suit.

3. Whether the taxpayer established by proof, as required by Section 621(d) of the Revenue Act of 1932 in order to recover, that the tax in question was not passed on, or if passed on was repaid, to the ultimate vendees or

purchasers of the products of the Pacific Goodrich Rubber Company.

4. Whether the deduction or credit against the manufacturers' excise taxes (imposed by Section 602 of the Revenue Act of 1932), allowed by Section 9(a) of the Agricultural Adjustment Act on cotton on which *processing taxes* were imposed and paid pursuant to Section 9(a), applies also to cotton on which *floor stocks taxes* were imposed and paid pursuant to Section 16 of the Agricultural Adjustment Act.

Statutes and Regulations Involved.

The statutes and regulations involved are set forth in the Appendix, *infra*, pages 47-51.

Statement.

The facts, including documents (exhibits), were stipulated between the parties hereto² [R. 80-92, 159-160], and were found as facts by the District Court substantially as follows [R. 141-152]:

The taxpayer is a corporation organized under the laws of the State of New York and is qualified to do business in the State of California, having an office in Los Angeles and its principal office and place of business in Akron, Ohio. [R. 141.]

On June 20, 1927, the Pacific Goodrich Rubber Company, the taxpayer's predecessor in interest, was incorpo-

²Most of the facts as stipulated between the parties hereto [R. 80-92, 159-160] were found by the court below as its findings of facts. [R. 141-152.] Other facts, taken from the stipulation of facts, were found by the court by reference [R. 152, par. XXIII] and have been substantially set forth herein-after.

rated under the laws of the State of Delaware and was dissolved on or about December 21, 1934. [R. 141.]

The present action arose under the internal revenue laws³ of the United States and was brought by the taxpayer for the recovery of additional manufacturers' excise taxes paid under protest by the Pacific Goodrich Rubber Company (hereafter called Pacific) to the then Collector of Internal Revenue.⁴ [R. 141-142.]

On June 30, 1934, 8,000 shares of the capital stock of Pacific were issued and outstanding, and none of them were subscribed for but unissued; after that date the number of shares of stock of Pacific, which were issued and outstanding, remained unchanged; and at no time thereafter were any of the shares subscribed for but unissued. [R. 142.]

At all times from the date of the first issuance of stock of Pacific up to and including the date of its dissolution, all of the stock issued by Pacific was issued in the name of the taxpayer, or in that of trustees for the benefit of the taxpayer who was the owner thereof. [R. 142-143.]

Under the provisions of the Agricultural Adjustment Act,⁵ Pacific was required to pay a tax upon the sale or other disposition of any article processed wholly or in chief value from cotton which it had on hand or in transit to it on August 1, 1933 (the date the processing tax on cotton went into effect by proclamation of the Secretary

³Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 602, as modified by the Agricultural Adjustment Act, c. 25, 48 Stat. 31, Sec. 9(a). [R. 141.]

⁴The Collector died before the commencement of this action, and his successor in office still holds the position. [R. 142.] The present action was therefore brought by the taxpayer, appellant herein, against the United States of America. [R. 2.]

⁵Section 16 of the Agricultural Adjustment Act, c. 25, 48 Stat. 31. [Appendix, *infra*.] [R. 143.]

of Agriculture), in an amount equivalent to the tax which would have been paid on the cotton had it actually been processed after August 1, 1933, *i. e.*, \$0.044184 per pound. Under that Act⁶ also, Pacific was allowed to compute the manufacturers' excise tax on tires, levied by Section 602 of the Revenue Act of 1932 [Appendix, *infra*], by deducting from the weight of the tires the weight of processed cotton in the tires upon which a processing tax, including a floor stocks tax, had been paid under Section 9(a) or Section 16(a) of the Agricultural Adjustment Act. [Appendix, *infra*.] [R. 143.]

On August 1, 1933, Pacific held for sale or other disposition, articles processed wholly or in chief value from cotton, namely, tire fabrics, threads and other materials having a total cotton content of 782,474 pounds (such articles hereinafter being referred to as processed cotton). Pursuant to Section 16 of the Agricultural Adjustment Act, and the pertinent regulations of the Treasury established thereunder, Pacific duly prepared and filed with the then Collector of Internal Revenue for the Sixth District of California its return reporting the sale or other disposition of the above-mentioned 782,474 pounds of processed cotton and paid to the Collector taxes thereon at the rate of \$0.044184 per pound, as duly fixed by the Secretary of Agriculture in the total sum of \$34,648.08. The tax was paid in four installments on August 31, September 30, October 31 and November 30, 1933, in the respective amounts of \$7,368.06, \$7,368.06, \$11,249.98 and \$8,666.03. No portion of the tax of \$34,648.08 has been refunded or credited to the taxpayer or to Pacific. [R. 143-144.]

⁶Section 9(a) of the Agricultural Adjustment Act. [Appendix, *infra*.] [R. 143.]

During the period from August 1, 1933, through January 5, 1934, Pacific manufactured and sold tires (exclusive of tax-free tires sold to the Government for export) which contained 705,806 pounds of the above-mentioned 782,474 pounds of processed cotton which were held for sale or other disposition by Pacific on August 1, 1933. The remaining 76,668 pounds of processed cotton which Pacific held for sale or other disposition on August 1, 1933, were manufactured and sold in rubber products other than tires or wasted. [R. 144-145.]

In computing the manufacturers' excise taxes imposed by Section 602(1) of the Revenue Act of 1932, on the above-mentioned tires manufactured and sold by Pacific during the period from August 1, 1933, through January 5, 1934, Pacific deducted from the weight of the tires the weight of the 705,806 pounds of processed cotton contained therein on which it had already paid the tax imposed by Section 16 of the Agricultural Adjustment Act. The manufacturers' excise tax so computed was reported by Pacific by the filing of manufacturers' excise tax returns with the then local Collector of Internal Revenue, and the amount of the tax so computed, namely, the sum of 2¼ cents per pound on the weight of the tires less the weight of the processed cotton contained therein on which the tax imposed by Section 16 of the Agricultural Adjustment Act had been paid, was paid to the Collector. [R. 145-146.]

The computation of the manufacturers' excise tax was rejected and disallowed by the Collector, and on or about April 10, 1934, demand was made upon Pacific by the Collector for the payment of additional manufacturers' excise tax in the sum of \$15,880.64, together with interest thereon in the sum of \$569.74, which interest was assessed

against Pacific on June 9, 1934. The additional manufacturers' excise tax demanded of Pacific was a tax of $2\frac{1}{4}$ cents per pound on the 705,806 pounds of processed cotton on which Pacific had paid the tax imposed by Section 16 of the Agricultural Adjustment Act, and the weight of which, for the purpose of computing the manufacturers' excise tax, was deducted by Pacific from the weight of the tires manufactured and sold by it during the period from August 1, 1933, through January 5, 1934. In response to the Collector's demand, the additional manufacturers' excise tax of \$15,880.64 was paid by Pacific on or about April 18, 1934, and the interest thereon of \$569.74 was paid on or about July 27, 1934. The payments were made under written protest solely for the purpose of avoiding penalties and interest, and the Collector was so advised at the time of payment. The Collector, in arriving at the amount of the additional manufacturers' excise tax and the interest thereon to be demanded of Pacific, determined for their convenience that the additional tax should be demanded for the months of November and December, 1933, and Pacific did not object to this action if demand for an additional manufacturers' excise tax was to be made but did object to any additional taxes being demanded. [R. 146-147.]

On June 30, 1934, and August 14, 1935, Pacific assigned everything it had to the taxpayer, including all rights, claims and choses in action against others, and particularly in the assignment of August 14, 1935, its claim for refund of the additional manufacturers' excise taxes involved herein. [R. 148, 191-196, Exs. A and B.]

At the close of business on June 30, 1934, all the property and assets of Pacific had been delivered in kind to the taxpayer, as the sole owner of the former's stock, and

therefore its board of directors and stockholders held various meetings during that year for the purpose of ratifying such action as well as the first assignment of all its rights, claims and choses in action against others, and also to dissolve the Pacific corporation according to law. [R. 147-148, 226-233, Ex. I.] There was no ratification by the directors or stockholders [R. 226-233], however, of the second assignment of August 14, 1935, whereby Pacific was purported to have assigned particularly its claim against the United States for the refund of the manufacturers' excise taxes in question [R. 194-196, Ex. B], approximately eight months after its dissolution on December 21, 1934. [R. 234-235.]

On or about August 31, 1935, the taxpayer and Pacific each filed with the local Collector a claim for refund dated August 19, 1935, of the additional manufacturers' excise tax and interest thereon in the aggregate sum of \$16,450.39, which had been paid by Pacific under protest as described above. Each of the claims was made upon the ground, as alleged therein, that under Section 9 of the Agricultural Adjustment Act, Pacific, in computing the manufacturers' excise tax on the tires manufactured and sold by it, was entitled to deduct from the weight of the tires the weight of the processed cotton therein on which it had paid a floor stocks tax under Section 16 of the Agricultural Adjustment Act. As an additional reason for the allowance of the taxpayer's claim, it was alleged therein that it was entitled to the refund claimed by reason of the above-mentioned assignment of June 30, 1934, from Pacific. [R. 148-149.]

On or about April 21, 1936, the taxpayer and Pacific each filed with the Collector an amended claim for refund dated March 30, 1936, of the same tax and interest as

claimed in their original claims for refund. Each of the amended claims for refund alleged the same grounds for its allowance as those alleged in the original claims for refund, and each alleged the further reason for its allowance that Pacific had not included the tax, the refund of which was claimed, in the price of the articles on which the tax was imposed, nor had it collected the amount of the tax from the persons to whom the articles were sold. [R. 149.]

On May 22, 1936, the Commissioner of Internal Revenue, by letter addressed to the taxpayer, rejected in full both its original and amended claims for refund on the ground that there was on file in his office a claim filed by Pacific for the refund of the same tax, based on the same contentions, and that the taxpayer's claims were therefore duplicate claims. On April 8 and May 22, 1936, the Commissioner of Internal Revenue rejected Pacific's original and amended claims for refund, respectively. The rejections of the claims were made on the grounds that the proper interpretation of Section 9(a) of the Agricultural Adjustment Act did not entitle it to a credit for the floor stocks tax, paid on the cotton contents of tires, in computing the manufacturers' excise tax. No part of the additional manufacturers' excise tax and interest in the aggregate sum of \$16,450.39, which was paid under protest by Pacific, has been repaid or refunded to the taxpayer or to Pacific, and no other action than the filing of the claims for refund and the bringing of this action has been brought or taken by the taxpayer or Pacific for the recovery of the tax and interest in question. [R. 149-150.]

On July 8, 1936, the taxpayer filed with the Collector of Internal Revenue at Akron, Ohio, a claim for abate-

ment of certain taxes and interest having no relation to the taxes and interest involved in this proceeding, but in which the taxpayer described itself as the successor to Pacific and in which it made the statement that Pacific transferred its assets to the B. F. Goodrich Company on or about June 30, 1934, and was dissolved on December 21, 1934. [R. 150-151.]

Throughout the period from August 1, 1933, to April 10, 1934, Pacific was informed and believed that, for the purpose of computing the manufacturers' excise tax on tires manufactured and sold by it, it was entitled, under the provisions of Section 9(a) of the Agricultural Adjustment Act, to deduct from the weight of the tires so sold, the weight of the processed cotton contained therein upon which a tax had been paid either under Section 9(a) or Section 16 of the Agricultural Adjustment Act. Pacific and the taxpayer at all times prior to April 10, 1934, believed that the tax burden with respect to such tires would amount to \$0.044184 per pound on the processed cotton contained in their tires and to 2¼ cents per pound on the remaining weight of the tires. At no time during the period preceding April 10, 1934, did Pacific or the taxpayer contemplate that either of them would be compelled to pay an additional manufacturers' excise tax of 2¼ cents per pound on the weight of the processed cotton contained in such tires and on which a floor stocks tax had been paid under Section 16 of the Agricultural Adjustment Act. All tires containing processed cotton which were held for sale or other disposition by Pacific on August 1, 1933, were sold and billed to the purchasers or vendees of Pacific long before demand was first made by the Collector that it pay an additional manufacturers' excise tax of 2¼ cents per pound on the weight of the proc-

essed cotton contained in the tires, and after the additional tax had been demanded and paid, no additional billing was made to the purchasers or vendees and no additional amount was collected from them. [R. 151-152.]

The court below also found as facts, by reference [R. 152, par. XXIII], substantially the following facts⁷ taken from the stipulation of facts entered into between the parties hereto [R. 80-92, 159-160]:

J. C. Herbert, if called as a witness, would have testified that as secretary and vice president of Pacific before its dissolution, he had charge of the corporate books and records [R. 81], and was familiar with the assets and affairs of Pacific. [R. 82.]

George Hubbell, if called as a witness, would have testified that as agent, cashier, auditor and/or assistant treasurer of Pacific at various times, he kept the books and records of Pacific showing the quantity and quality of articles—tire fabrics, thread and other materials—which were processed wholly or in chief value from cotton and held for sale on August 1, 1933; the quantity and type of tires Pacific manufactured from such articles from August 1, 1933, to January 5, 1934; the cotton content and the quantity of processed cotton contained and used in the manufacture of tires which comprised the articles processed from cotton and held for sale or other disposition by Pacific on August 1, 1933; the other items and matters relating to taxes paid by Pacific and its dealings under all the Revenue Acts and the Agricultural Adjustment Act of

⁷These facts found by reference by the District Court [R. 152, par. XXIII] relate to the testimony two witnesses would have given if called to testify, as included in the stipulation of facts. [R. 81-92.] Only the portions thereof, which were not set forth by the court in its other findings but were found by reference, are given here in substance.

the United States [R. 83-84]; that he was familiar with and knew the prices at which Pacific sold its tires during the period herein; whether or not the prices at which Pacific sold the tires were included in the prices of the tires sold from August 1, 1933, to January 5, 1934; any amount to cover any excise tax on the processed cotton contained in the tires manufactured and sold by Pacific during such period; whether the prices at which Pacific sold tires during such period, containing the processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act, were any greater than the prices at which it sold tires containing processed cotton on which a tax was payable under Section 9(a) of that Act; whether any additional billing was made to customers and/or vendees who purchased tires during that period after the assessment of the taxes here in question [R. 85]; that Pacific did not include or intend to include in the prices of its tires sold from August 1, 1933, to January 5, 1934, any amount to cover any excise tax on the processed cotton contained in the tires manufactured and sold during that period; and that the prices at which Pacific sold the tires during that period containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act were no greater than the prices at which it sold the tires containing processed cotton on which a tax was payable under Section 9(a) of that Act. [R. 91.]

On the basis of the foregoing facts, the court below concluded as a matter of law and held that Pacific was

entitled to have computed the manufacturers' excise tax in question on the basis of the weight of the tires manufactured and sold by it, less the weight of the processed cotton therein on which processing or floor stocks taxes had been paid, and therefore the tax in question was erroneously and illegally collected and Pacific is entitled, as the actual taxpayer, to the refund thereof [R. 153-155]; that the taxpayer, the successor in interest to Pacific, did not have the right to the refund of the taxes in question because of its ownership of all the stock of Pacific or the dissolution and distribution of all of Pacific's assets in kind to the taxpayer, but solely because of the assignments made by the former to the taxpayer; that in so far as the assignments purported to assign Pacific's refund claims against the United States to the taxpayer, they were null and void *ad initio* under Section 3477, Revised Statutes, and therefore the taxpayer acquired no rights to the refund of the taxes sought to be recovered herein; and, furthermore, that the taxpayer had failed to establish that the taxes in question had not been passed on to the vendees or purchasers of the products of Pacific, within the meaning and requirements of the pertinent statutes. [R. 155-156.] The court thereupon gave judgment in favor of the United States, with costs, and decreed that the taxpayer take nothing. [R. 157-159.] From the judgment so entered, the taxpayer appealed to this Court. [R. 170.]

Summary of Argument.

1. Pacific's two assignments purporting to transfer its claims for refund of manufacturers' excise taxes against the United States to the taxpayer were not executed in the presence of at least two attesting witnesses *after* the allowance of such claims, the ascertainment of the amount due and the issuance of a warrant for the payment thereof by the Commissioner of Internal Revenue, nor did they recite any warrant for payment or acknowledgment by a proper officer who had certified at the time of making the assignments that he had read and fully explained them to the person acknowledging them. The assignments were therefore ineffective to permit the taxpayer to bring this suit under the specific terms of Section 3477, Revised Statutes. The refund claims were not distributed in kind to the taxpayer upon Pacific's dissolution and therefore by operation of law at the end of 1934 for the reason that the taxpayer had acquired its right to the chose in action by the first voluntary assignment for a consideration several months before the dissolution, and that assignment was ineffective under Section 3477, as heretofore stated. The claims could not have been passed on to the taxpayer, as the beneficial owner upon Pacific's dissolution at the end of 1934, by operation of law. It follows that, under Section 3477, Revised Statutes, the taxpayer could not properly maintain the present action and is not entitled to recover.

2. The grounds first advanced in the taxpayer's amended petition and relied upon herein are new, unrelated and materially and fatally different from those originally included in the claims for refund filed with and considered and rejected by the Commissioner of Internal

Revenue to the end that that official was not apprised thereof. The original claims were based on a claimed recovery under Section 9(a) of the Agricultural Adjustment Act and also because of the assignment of June 30, 1934, and the amended claims were based on the same grounds and on the further ground that Pacific had allegedly not passed the taxes in question on to its vendees. Not until the filing of the taxpayer's first amended petition, however, when it was too late to have filed further claims, did the taxpayer attempt to enlarge upon the grounds set forth in the refund claims by alleging the new grounds now relied upon, namely, that its right to recovery was based on its sole ownership of Pacific's capital stock and the succession to its assets by operation of law, and also because of the two assignments. The Government has not waived the necessity of the taxpayer's literal compliance with the statutory and regulatory requirements that the bases relied upon in suit must be the same as those set forth in the refund claims of which the Commissioner was apprised and upon which he acted, and it is settled that claims for refund based on a particular ground may not form the basis for a suit claiming recovery upon an entirely different ground. Under the regulations and authorities, therefore, the taxpayer is not entitled to maintain the present action or to recover any refund.

3. We have already shown that the assignments relied upon by the taxpayer did not cause the taxpayer to succeed to Pacific's claims for refund by operation of law. Under the facts herein, *Pacific* was "the person who paid the tax" and therefore, under the pertinent statute and regulations, Pacific alone was entitled to maintain the present action and, upon sufficient proof in accordance

with the specific requirements of the statute and regulations, to recover.

At all events, the taxpayer is not entitled to recover in the absence of proof that Pacific did not pass the taxes in question on to its vendees. The proof (testimony of Pacific's former employee) submitted by the taxpayer to the effect that Pacific did not pass the taxes on to the purchasers as part of the price of the tires manufactured and sold to them was properly objected to by the Government as being insufficient on the grounds that it was not the best evidence. Pacific's books of accounts and sales records, showing in fact whether or not the taxes in question had been included in the sales prices of the tires with respect to which they were imposed, would have been the best evidence but no explanation was given by the taxpayer for its failure to have produced such vital records and data. Since the taxpayer failed to meet the specific requirements of the statutes and regulations, therefore, it was not entitled to maintain the instant action for the recovery of the manufacturers' excise taxes in question.

It is clear too that the court below, upon a hearing and full consideration, did not abuse its discretion in denying the taxpayer's motion to reopen the case and submit further proof. The record (affidavits accompanying the motion) indicate that the taxpayer could not have produced any new and material proof beyond that already stipulated between the parties hereto and submitted to the court upon the trial of the case. It is settled that the granting or refusing to grant a motion for rehearing on a new trial rests in the sound discretion of the court to which the motion is addressed and such action is reviewable only in case of abuse, not shown herein.

4. The deduction or credit against manufacturers' excise taxes imposed by the 1932 Act, allowed by the Agricultural Adjustment Act on cotton on which *processing taxes* were imposed by Section 9(a) thereof, does not apply also to cotton on which *floor stocks taxes* were imposed by Section 16 of that Act. Section 9(a) and (d) (2) of the latter Act defines "processing taxes" as a tax on the processing of various articles (cotton herein), and makes a specific provision for a credit therefor, against sales taxes, to the extent that the processed taxed article has been included in the finished taxed product. Section 16 of that Act, however, imposes but does not define floor stocks taxes which are taxes on the possession of various articles (cotton herein) held for sale, and makes no provision for a credit for such taxes, against sales taxes, to the extent that the initially taxed article has been included in the finished taxed products. It is clear that no provision for a floor stocks tax credit may be read into that section by implication or inference, merely because such a credit appears in Section 9(a) for processing taxes, lest there be added something entirely new, not in the statute, to the meaning of the word "processing" as defined in the statute. There is nothing in the statute to indicate or imply that the floor stocks tax as used in Section 16 may properly be used interchangeably with or in lieu of the "processing tax" as used in Section 9(a) of the Act. Allowance of such a credit for floor stocks taxes is a matter of legislative grace, and since it is not provided for—as is the processing tax—in the terms of the statute and the claim for the allowance thereof is a claim to exemption, the taxpayer must bring itself squarely within the express terms of the statute. This the taxpayer has failed to do, and it is therefore not entitled to recover or to any refund.

ARGUMENT.

I.

The Assignments of Its Claims for Refund Against the United States Made by Pacific to the Taxpayer Were Ineffective Under Section 3477, Revised Statutes, and Therefore the Taxpayer Could Not Properly Maintain the Present Action and Is Not Entitled to Recover.

Such decision of this issue adversely to the taxpayer, is harmony with the decision of the court below, would be determinative of the entire case and foreclose the taxpayer's recovery of the taxes in dispute. It is dealt with first.

The court below stated, in respect to the two assignments made by Pacific to the taxpayer, that the latter's claim hereto as the right of action and recovery of the taxes in question was, in the original petition filed October 1, 1937 (P. 1-25), based solely on the two assignments; that not until almost two and one-half years later, when it subsequently filed its first amended petition on February 3, 1940 (P. 54-78), did the taxpayer assert its right to recover on the grounds—which the court stated, were at variance with its claims for refund based solely upon the assignments (P. 101)—that it was the sole stockholder of Pacific and succeeded to Pacific's right to recover by operation of law upon the latter's dissolution on December 21, 1934, that the only authenticated claim⁶ in the record

⁶The claim referred to was a claim for the abatement of certain taxes on income herein P. 234-251 Ex. 2, filed by the taxpayer on July 8, 1938, with the Collector of Internal Revenue, Canton, Ohio, in which it asserted itself as the successor to the Pacific Coal and Timber Company and made the statement that it was the taxpayer or person of the transfer of Pacific's assets to it, the assignment of June 30, 1934, and the dissolution of Pacific on December 21, 1934. (P. 104 150-51, par. XXII.)

that the taxpayer is the taxpayer by reason of the assignment of June 30, 1934, and the dissolution of Pacific on December 21, 1934, does not materially alter the taxpayer's previous position based on the two assignments consistently adhered to until the exigency of avoiding the consequences of the statute relating to assigned claims against the United States [Section 3477, Revised Statutes, Appendix, *infra*] became imminent; and consequently, it concluded as a matter of law and held that the chose in action did not lodge in the taxpayer because of its sole ownership of Pacific's stock on the dissolution of that corporation at the end of 1934, but solely by reason of the two assignments which were executed voluntarily by the two corporations for expressed valuable considerations; and therefore the taxpayer's status as a claimant against the United States is clearly within the provisions of Section 3477, Revised Statutes. [R. 103-105, 155.]

While the taxpayer claimed before the court below in the original petition—based on the ground set forth in the claims for refund rejected by the Commissioner—that it was entitled to maintain the instant action and recover the taxes in question on the basis of the assignment in question, it now contends that the distribution in kind by Pacific, pursuant to its dissolution, was a transfer by operation of law, that the taxpayer therefore, as transferee by operation of law and sole stockholder of the dissolved corporation, could properly maintain this suit for refund, and that if the right to the refund did not pass by the assignment, it passed automatically upon Pacific's

dissolution to the taxpayer, its sole stockholder.⁹ (Br. 17-34.)

We submit that Pacific's claims for refund against the United States were not transferred to the taxpayer by operation of law under circumstances herein; that the assignments in question wholly failed to comply with the requirements of Section 3477, Revised Statutes, and they were therefore ineffective under that statute; and that the taxpayer acquired no rights thereunder to the refund of the taxes paid by Pacific and sought to be recovered herein, as the court below held. [R. 103-105, 155.]

Section 3477, Revised Statutes (31 U. S. C., Section 203) provides that all transfers or assignments of any claim upon the United States—

* * * shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing a warrant for the payment thereof. Such transfers, [and] assignments * * * must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, [or] assignment * * * to the person acknowledging the same. * * *

⁹The taxpayer's present contentions were asserted for the first time upon its filing the first amended petition below [R. 50-75], almost two and one-half years after filing the original suit. [R. 2-25.] We contend this is a fatal variance from the basis of the refund claims, submitted to, acted upon and rejected by the Commissioner of Internal Revenue, which formed the basis for the original petition, as shown hereinafter under Point II.

None of the foregoing statutory requirements was met in the instant case. In the first place, contrary to the taxpayer's contention, the claims for refund in question were not distributed in kind either by Pacific's assignment of June 30, 1934, or by the second assignment of August 14, 1935, to the taxpayer upon the former's dissolution on December 21, 1934, and therefore by operation of law. The reasons therefor are that the first assignment, made six months before Pacific's dissolution, could not have been a distribution according to the resolutions of the directors and the stockholders pursuant to dissolution. It was merely a voluntary assignment for a consideration [R. 105, 191], having no possible relation to the subsequent dissolution. The assignment was effective as between the parties to give the taxpayer the right of any potential chose in action against the United States so that the subsequent dissolution did not distribute this claim in kind. This assignment, however, was ineffectual in so far as the right to maintain this suit was concerned because of the specific provisions of Section 3477, Revised Statutes. The claims were not filed until August 31, 1935,¹⁹ and April 12, 1936,²⁰ [R. 199-202, 204-208, 209-214, 215-220], and therefore they had not yet come into being as formal statutory claims for refund asserted against the United States at the time the proposed assignments thereof were allegedly made by

¹⁹The original and amended claims for refund were filed August 15, 1935, and March 30, 1936, but they were not filed with the Collector of Internal Revenue until August 21, 1935, and April 21, 1936, respectively, [R. 209-214, 215-220.]

Pacific, and the attempted assignment of a potential chose in action, unascertained as to amount or allowance, clearly would come within the specific prohibition of Section 3477, Revised Statutes.

The taxpayer argues (Br. 33-34) that if the first assignment of June 30, 1934, because it was made prior to dissolution of Pacific, did not effect a transfer of the claim against the United States by operation of law, then at all events the second assignment of August 14, 1935, of this particular claim was unqualifiedly a distribution of this asset in kind to the taxpayer. It is our view, however, that the second assignment had no effect whatever for the reason that any right of the taxpayer to the claim against the United States had arisen upon the first assignment for a consideration, which was ineffectual because of Section 3477, Revised Statutes, and for the further reason that the second assignment occurred long after the dissolution. Since Pacific, upon dissolution on December 21, 1934, had "neither *de jure* nor *de facto* existence and is as legally extinct as a dead man," as taxpayer admits (Br. 19), and the second assignment and the claims for refund were not made against the United States—ostensibly by Pacific, an extinct corporation—until a year or so thereafter, it necessarily follows, of the taxpayer's own admission, that Pacific was without existence and therefore without power to have made or assigned a lawful or valid claim against the United States. The second assignment of August 14, 1935 [R. 194-196], allegedly assigning Pacific's claim against the United States to the

taxpayer, could not have been made by an extinct corporation. It is apparent, therefore, that the claims in question could not have been distributed upon Pacific's dissolution at the end of 1934 to the taxpayer, its sole stockholder, by operation of law. The second assignment, ostensibly made by Pacific, was not made until after its extinction as a corporation, and the two refund claims, ostensibly made by Pacific after dissolution, were not in existence until long thereafter. Consequently, contrary to the taxpayer's contentions, the dissolution of Pacific could not have effected a transfer of its claims to the taxpayer as the beneficial owner thereof by operation of law or otherwise.

There are other requirements of the statute (Section 3477, Revised Statutes) not met by the taxpayer. Thus, the statute calls for two attesting witnesses, whereas the assignment of June 30, 1934, relied on almost entirely herein by the taxpayer¹¹ (Br. 19), contained an attestation by Pacific's secretary. [R. 103.] While the second assignment did contain two attesting witnesses [R. 195], it nevertheless was made after the corporation had become extinct, and therefore was without binding effect. Even more fatal is the fact that the refund claims, at the time the proposed assignments were supposedly executed

¹¹The taxpayer relies almost entirely on the first assignment of June 30, 1934 (Br. 19), but contends, apparently alternatively, that if it was ineffectual in effecting distribution upon dissolution of Pacific almost six months later, then the taxpayer relies on the later assignment of August 14, 1935. Since the taxpayer admits, however, that Pacific was completely extinct as a corporation upon its dissolution on December 21, 1942 (Br. 19), the second alleged assignment made eight months later could have had no validity, as heretofore shown.

by an extinct corporation, had neither been allowed nor ascertained as to the amount finally to be due Pacific upon the allowance thereof, nor had a warrant been issued for the payment thereof. [R. 105.] These are specifically required by the terms of the statute *before* such an assignment may be legally made in the presence of two attesting witnesses, as the court below held. [R. 103-105, 155.] Finally, the assignments in question did not “recite the warrant for payment” and were not certified before the maker by a competent officer who made it appear in his certificate that he “at the time of the agreement, read and fully explained the transfer, [or] assignment * * * to the person acknowledging the same,” as required by the statute.

The taxpayer seeks to avoid the effect of its obvious noncompliance with Section 3477 by arguing that the general purpose of the statute is to prevent frauds on the Treasury, and authorities are cited to that effect. (Br. 24-33.) Those cases are either distinguishable or stand for the general proposition, substantially, that the successor corporation has the right to maintain suit for the recovery of taxes paid by its predecessor where the plaintiff was shown by authorized union to have fallen heir to the predecessor’s claim against the United States through consolidation, reorganization, liquidation, etc., thereby becoming the successor in interest, and consequently Section 3477 was held inapplicable. But taxpayer herein is not shown to have been the actual successor to Pacific’s claim against the United States other than by the statements

in the totally unrelated abatement claim which it filed in Akron, Ohio [R. 151, 239-256, Ex. 3, 4], it having actually succeeded to the claim in question, through the first assignment for a good and valuable consideration and therefore, running counter to the provisions of Section 3477, it was not entitled to maintain the present action, as the court below held. [R. 104, 106-107.] However that may be, we respectfully submit that the statute should be applied to the instant case in which there was a complete failure to comply with each of the statutory requirements, regardless of the absence of any element of fraud upon the Treasury. Cf. *National Bank of Commerce v. Downie*, 218 U. S. 345; *Spofford v. Kirk*, 97 U. S. 484; *Manhattan Commercial Co. v. Paul*, 216 N. Y. 481. Thus, in *The John Shillito Co. v. McClung*, 51 Fed. 868 (C. C. A. 6th), the court held that the assignment of an unliquidated claim for customs duties alleged to have been illegally exacted is void under the statute. It may be observed that although taxpayer characterizes the cases it cited as holding the statute applicable to assignments by operation of law under circumstances comparable to those in the case at bar, none of the cases relied upon excuses total contravention of all the statutory requirements in a situation similar to that involved in the instant case, and it has already been shown that the claims for refund, born long after Pacific's dissolution, were not inherited by taxpayer by operation of law or otherwise.

II.

The Taxpayer Is Not Entitled to Maintain the Instant Action and to Recover a Refund Because the Grounds Relied Upon in the Claims Filed by Pacific With the Collector and Alleged in the Original Petition Differ Materially From the New and Unrelated Grounds Relied Upon in the Present Suit.¹²

As the court below stated, there is a variance between the grounds relied upon by the taxpayer and Pacific in the rejected claims for refund¹³ on which the taxpayer's right of recovery was based solely on the two assignments, as in the original petition [R. 2-25], and the new grounds set forth for the first time in the taxpayer's first amended petition, filed two and one-half years later. [R. 50-78.] In the latter, the taxpayer based its claim to recovery of the tax in question on the grounds of its sole ownership of Pacific's stock and that if it did not succeed to Pacific's right to recover by reason of the two assignments originally relied upon, then it succeeded thereto by operation of law upon the distribution of Pacific's assets in June, 1934, and its dissolution in December, 1934. [R. 102.] The court held, however, that while there must be literal

¹²While this point was not urged by the Government in the court below, it is settled that the Government is free to sustain its case upon any legal ground which will support it. *LeTulle v. Scofield*, 308 U. S. 415, 421, 422; *United States v. Ryerson*, 312 U. S. 260. The filing of a timely claim for refund is, of course, a prerequisite to the maintenance of a suit. *United States v. Felt & Tarrant Co.*, 283 U. S. 269.

¹³The claims filed by the taxpayer were summarily rejected by the Commissioner because they were merely duplicate claims of those filed by Pacific, containing the same basis for the recovery of the same tax. [R. 149-150.] Since the taxpayer apparently relies no further on them, we have not dealt with them herein.

compliance with the statutory requirements that a claim be filed before suit may properly be brought for a tax refund and the Treasury Regulations require that claims for refund specify in detail each ground upon which they rely, as well as facts sufficient to apprise the Commissioner of the exact basis thereof [Treasury Regulations 46, Article 71, Appendix, *infra*]; such requirements were in effect waived herein by the Commissioner's rejecting all the claims on the broad ground that neither the taxpayer nor Pacific had a right to a refund under the Commissioner's interpretation of Section 9(a) of the Agricultural Adjustment Act [Appendix, *infra*], without insisting upon their literal compliance with the requirements of the Regulations. [R. 103.]

We submit, however, that the grounds first advanced in the amended petition and relied upon here, were new, unrelated and materially and fatally different from those included in its claims for refund filed with the Collector and rejected by the Commissioner to the end that the Commissioner was not apprised of the exact basis thereof and consequently, under the Regulations and authorities cited hereafter, the taxpayer is not entitled to recover.

Thus, in the original claims for refund filed by the taxpayer and Pacific on August 31, 1935, it was claimed that they were entitled to recover under Section 9(a) of the Agricultural Adjustment Act and, additionally, in the taxpayers' claim that it was entitled to recover because of the assignment of June 30, 1934. [R. 148-149, 199-202, 209-214.] In the amended claims filed on April 21,

1936, they made the same claims for the same taxes and interest as originally claimed, and further that Pacific had not passed the taxes in question on to the vendees. [R. 149, 204-208, 215-220.] Not until the first amended petition¹⁴ was filed on February 5, 1940—without having timely filed any further claims for refund, setting forth the new grounds relied upon herein¹⁵—was the basis set forth in the refund claims attempted to be enlarged upon by the allegations that the taxpayer's right to recovery was based on its sole ownership of Pacific's assets and its capital stock, and also because of the two assignments of June 30, 1934, and August 14, 1935. [R. 50-78.]

Thus the taxpayer is now relying on entirely different and unrelated grounds from those set forth in the claims for refund which were considered and rejected by the Commissioner. We therefore deny the correctness of the holding of the court below that the Commissioner's rejection of the claims had effected a waiver of his right to insist that the grounds asserted in the suit correspond to

¹⁴At the time of filing the first amended petition on February 5, 1940, it was too late to have filed further claims setting forth the new bases now relied upon for the reason that the taxes were paid in 1934 [R. 146], and the law and authorities require that claims for the refund of excise taxes must be filed within four years after payment of such taxes (Section 3313, I. R. C.); and that valid amended claims setting forth new and unrelated grounds from those included in the original claims must be filed before the expiration of the statute of limitations. *United States v. Andrews*, 302 U. S. 517; *United States v. Garbutt Oil Co.*, 302 U. S. 528.

¹⁵While it was stipulated between the parties hereto that the petition and the amendment thereto may be amended in the particulars as set forth in the taxpayer's first amended petition [R. 78, par. (a)], that was merely an agreement to the amendment as filed and not an admission of the truth of the allegations set forth therein. This is shown by the further stipulation that the defendant's answer, denying the taxpayer's allegations in the original petition [R. 41-48], was deemed to be equally an answer to those in the amended petition. [R. 78-79, par. (b).]

those asserted in the claims. No waiver was effected by the rejection of the claims on the ground that no right of refund existed in the taxpayer or Pacific.

It is settled that a claim for refund based on a particular ground may not form the basis for suit claiming recovery of taxes upon an entirely different ground. *United States v. Felt & Tarrant Co.*, 283 U. S. 269 (holding that refund claims based upon the application for special assessment of profits tax did not form the basis for a suit claiming depreciation of patents); *Real Estate Title Co. v. United States*, 309 U. S. 13. This Court has so held. *United States v. Burns*, 114 F. (2d) 1023. In *United States v. Felt & Tarrant Co.*, *supra*, the Supreme Court stated (pp. 272-273):

One object of such requirements is to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue, *Nichols v. United States*, *supra*, p. 130, a purpose not accomplished with respect to the present demand by the bare declaration in respondent's claim that it was filed "to protect all possible legal right of the taxpayer." The claim for refund, which §1318 makes prerequisite to suit, obviously relates to the claim which may be asserted by the suit. Hence, quite apart from the provisions of the Regulation, the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded.

The Court of Claims, in allowing recovery, relied upon *Tucker v. Alexander, supra*, and upon the fact that, at the time when respondent filed its return and its claim for refund, the Treasury had consistently refused to allow deductions from gross income for exhaustion of patents. Consequently it held that the filing of a demand which was certain to be refused was a futile and unnecessary act. But in *Tucker v. Alexander* the right of the Government to insist upon compliance with the statutory requirement was emphasized. Only because that right was recognized was it necessary to decide whether it could be waived. The Court held that it could, and that in that case it had been waived by the stipulation of the collector filed in court. Here there was no compliance with the statute nor was there a waiver of its condition, since the Commissioner had no knowledge of the claim and took no action with respect to it.

The necessity for filing a claim such as the statute requires is not dispensed with because the claim may be rejected. It is the rejection which makes the suit necessary. An anticipated rejection of the claim, which the statute contemplates, is not a ground for suspending its operation. Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and "they mark the conditions of the claimant's right." *Rock Island R. R. v. United States*, 254 U. S. 141, 143. Compliance may be dispensed with by waiver, as an administrative act, *Tucker v. Alexander, supra*; but it

is not within the judicial province to read out of the statute the requirement of its words. *Rand v. United States*, 249 U. S. 503, 510.

Likewise in the present case there was no compliance with the statute, nor was there a waiver of its condition as there was in *Tucker v. Alexander*, 275 U. S. 228, since the Commissioner had not been advised, in the claims for refund, of the new grounds relied upon in the taxpayer's first amended petition, and consequently could have taken no action with respect thereto. While the rules laid down by the Supreme Court in the *Felt & Tarrant Co.* case have not been strictly adhered to by all of the courts, departure therefrom has been principally in cases involving materially different facts (such as, for example, where the grounds relied upon in the suit were *substantially* the same as those set forth in the refund claim (*United States Paper Exports Ass'n v. Bowers*, 6 F. Supp. 735 (S. D. N. Y.), reversed on another ground, 80 F. (2d) 82 (C. C. A. 2d)), or in those cases decided prior to the Supreme Court's decision in the *Felt & Tarrant Co.* case. Failure of the Government to have expressly asserted in the answer that the taxpayer's claims were insufficient to support the grounds alleged in the first amended petition was not a waiver by the Government. *Aladdin Co. v. Woodworth*, 43 F. (2d) 150 (Mich.).

III.

The Taxpayer Is Not Entitled to Recover Since It Was Not “the Person Who Paid the Tax,” nor Has It Established by Requisite Proof That Pacific, the Real Taxpayer, Did Not Pass the Taxes in Question on to Its Vendees, as Required by the Statute and Regulations in Order to Recover.

The court below held that the taxpayer failed to bring itself strictly within the terms and requirements of Section 621(d) of the Revenue Act of 1932 [Appendix, *infra*] as “the person who paid the tax” since it was a corporate entity separate from Pacific, the actual corporate taxpayer; that Pacific paid the tax while it was conducting business under its own name and in its own capacity, filed its own tax returns, paid under protest, upon demand, the taxes in question partly before and partly after the assignment of June 30, 1934, and claimed the right to the refund of the portion thereof which is the subject matter of the instant action; and that the assignments relied upon by the taxpayer herein recite that they were made for good and valuable consideration inuring to Pacific, the record not showing what items made up such consideration. It held further that the taxpayer is conclusively barred from recovery for it failed to meet the requisite burden of proving that the taxes in question had not been passed on by Pacific to its vendees. [R. 105-108.]

The statute and regulations require that before a refund of manufacturers’ excise taxes may be made pursuant to court decision or otherwise, “the person who paid the tax” must establish, as required by the Commissioner’s regulations, that (1) “he has not included the tax in the price of the article in respect to which it was imposed, nor

collected the amount of the tax from the vendee or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund." Section 621 (d), Revenue Act of 1932; Regulations 46, Art. 71.¹⁶

(a) THE TAXPAYER WAS NOT "THE PERSON WHO PAID THE TAX" AND THEREFORE MAY NOT RECOVER.

The taxpayer admits that the phrase "the person who paid the tax" has not been previously construed by the courts. It contends, however, that since it, as transferee or assignee by operation of law of the person who paid the tax herein, is not within the prohibition of Section 3477 of the Revised Statutes, it as such an assignee by operation of the law must be regarded as the person who paid the tax under Section 621(d) of the 1932 Act.¹⁷ (Br. 56-67.)

We have already shown, however, that the taxpayer did not succeed to Pacific's right of action herein by operation of law but, solely through the instrumentality of the first assignment given for adequate and valuable consideration

¹⁶Substantially the same requirements are set forth in the Revenue Act of 1936, c. 209, 47 Stat. 1648, as conditions requisite for the allowance of refunds of taxes collected under the Agricultural Adjustment Act pursuant to court decision or otherwise (Section 902(a) and (b)), cited by the taxpayer as an analogous statute under which relief has been given to transferees and assignees. (Br. 57-59.) That statute, however, can have no application herein since it permits refunds of such taxes only if the claim therefor was filed after its enactment on June 22, 1936, and prior to July 1, 1937 (Section 903), whereas the taxpayer's and Pacific's claims for refund were filed on August 31, 1935, and April 21, 1936 [R. 148-149], for manufacturers' excise taxes collected under Section 602 of the 1932 Act. [Appendix, *infra*.] The authorities cited by the taxpayer in connection therewith (Br. 58-62), therefore, have no relevancy or application herein, as the court below stated. [R. 101.]

¹⁷G. C. M. 21058, 1939—1 Cum. Bull. (Part 1) 280, on which the taxpayer relies (Br. 56-57), applies to refunds of taxes, collected under the Agricultural Adjustment Act, allowed to be made under the conditions specified in Sections 902-903 of the 1936 Act, and therefore has no application herein. See fn. 16, *supra*.

—the specific items comprising which are not shown by the record [R. 105]—flowing from taxpayer to Pacific, as the court below properly held [R. 107]; and therefore the taxpayer may not claim the right of action as transferee, assignee or otherwise, for the recovery of the excise taxes here in question paid by another taxpayer, a separate and distinct corporate entity. We have also shown that the assignments were expressly prohibited and rendered ineffective by the provisions of Section 3477 of the Revised Statutes. Therefore, Pacific alone was entitled to sue for the tax. But even if Section 3477 of the Revised Statutes did not bar this suit, the taxpayer cannot recover because Section 621(d) imposes another requirement, namely, that a refund shall be allowed only to the person who paid the tax.

Pacific alone was “the person who paid the tax,” entitled to maintain the action and, upon sufficient proof in accordance with the specific requirements of the statute and regulations, to recover. Section 621(d), 1932 Act; Regulations 46, Art. 71. A transferee is not the person who paid the tax. In *Coropens v. United States* (W. D. S. C.), 15 A. F. T. R. 794, affirmed on other grounds 79 F. (2d) 553 (C. C. A. 4th), it was held that the plaintiff corporation which acquired the stock of the taxpayer corporation for cash and a small amount of stock without any reorganization of the taxpayer corporation, was not entitled to recover. *Dalton Foundries v. United States*, 56 F. (2d) 483 (C. Cls.). Cf. *Keith v. Woodworth*, 115 F. (2d) 897 (C. C. A. 6th) (denying recovery of the taxes

paid by another corporation); *Ungar v. Higgins*, 27 F. Supp. 904 (S. D. N. Y.) (holding a judgment creditor of the taxpayer could not maintain the suit for recovery); cf. also, conversely, *Lion Coal Co. v. Anderson*, 62 F. (2d) 325 (C. C. A. 10th) (holding that the payment made by a transferee, even though paid under protest, was not recoverable in the absence of a showing that the transferee was not liable for the tax); *Central Aguirre Sugar Co. v. United States*, 2 F. Supp. 538 (C. Cls.) (holding a transferee corporation which made a voluntary payment of taxes due from its transferor was not entitled to recover); *Charles A. Zahn Co. v. United States*, 6 F. Supp. 317 (C. Cls.) (holding a suit filed after the expiration of the period for which the corporation was continued under the state statute could not be maintained); and *Western Knitting Mills v. United States*, 2 F. Supp. 119 (C. Cls.) (holding that the corporation was not entitled to recover in a suit against the United States for an amount of a refund paid to its successor).

(b) THE TAXPAYER IS NOT ENTITLED TO RECOVER IN THE ABSENCE OF PROOF THAT PACIFIC DID NOT PASS THE TAXES IN QUESTION ON TO ITS VENDEES.

The court below held that the taxpayer's failure to have sustained the statutory burden of proving the crucial issue that Pacific did not pass the taxes in question on to its vendees was, under the facts herein, an insuperable barrier to its recovery of any refund. [R. 107-108.]

The taxpayer contends that the former employees who kept the books of Pacific were competent to testify that

the additional taxes in question were not included in the sales prices of the articles in respect to which they were imposed, and that therefore the court below erred¹⁸ in denying relief on the sole ground that the person who paid the tax (Pacific) had not *itself* established the necessary facts required as proof under the statute. (Br. 66-67.)

We submit, however, that the court below correctly held that the taxpayer failed to meet the statutory burden of establishing that the taxes in question were not passed on by Pacific to its vendees as a part of the prices of the tires manufactured and sold by it during the period involved herein, or if passed on, that it paid the amount thereof to the ultimate purchasers, as required by the statute and regulations (Section 621(d) of the Revenue Act of 1932; Article 71 of Treasury Regulations 46) in order that recovery may be had.

In this connection, the Government entered into a stipulation—with a reservation as to its sufficiency [R. 136-

¹⁸The taxpayer also contends (Br. 69-74) that the court below abused its discretion in denying its motion, supported by several affidavits, to reopen the case and admit further proof on this issue. [R. 110-135.] The record shows, however, that the motion was properly opposed by the Government [R. 136-139] and upon a showing that the taxpayer had already submitted in evidence a stipulation of facts entered into between the parties hereto [R. 80-92] that its witnesses, if called, would testify substantially to the same proof as was sought to be submitted by the motion to reopen the case, the court, upon a hearing had thereon, rendered an oral opinion and denied the motion. [R. 139-140.]

It is settled that the granting or refusing to grant a motion for rehearing or a new trial rests in the sound discretion of the court or tribunal to which the motion is addressed, and the action taken therein is reviewable only in case of abuse shown. *Newcomb v. Wood*, 97 U. S. 581, 583-584; *Railway Company v. Heck*, 102 U. S. 120; *Holmgren v. United States*, 217 U. S. 509, 521. Since it is plain from the record [R. 136-139] that the taxpayer could have adduced no new and/or material proof beyond that already stipulated between the parties and submitted to the court at the trial of the case [R. 80-92, 159-160], there was clearly no abuse when the court, upon a hearing and full consideration, in its sound discretion denied the motion.

138]—with counsel for the taxpayer [R. 80-92] that a former employee (one Hubbell, cashier and auditor) of Pacific, if called as a witness, would have testified substantially that he was familiar with, supervised, controlled and kept the books and records of Pacific during the period here in question and knew the prices at which Pacific sold the tires at all times applicable herein; that during the period from August 1, 1933, to January 5, 1934, Pacific neither included nor intended to include in the price of the tires sold during that period any amount to cover any excise taxes on the processed cotton contained in the tires manufactured and sold by it during that period; and that the prices at which Pacific sold its tires during the period in question were no greater for tires containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act [Appendix, *infra*] than the prices at which it sold tires during the same period containing processed cotton on which a tax was payable under Section 9 of that Act. [R. 83-84, 85, 91.]

This was substantially the entire evidence relied upon by the taxpayer in an attempt to establish that the taxes in question had not been passed on by Pacific in the sale of its tires to the vendees. No books of account or sales records were produced showing, in fact, whether or not the taxes in question were included in the prices of the tires with respect to which they were imposed—proof definitely required by the statute and regulations—and no explanation was given by the taxpayer for failure to have produced such vital records and data. The taxpayer's

only offer of proof, therefore, consisted merely of the statements of one of Pacific's former employees. This was insufficient to show that the tax had not been passed on. *Cudahy Packing Co. v. United States*, 126 F. (2d) 429 (C. C. A. 7th); *United States v. H. T. Poindexter & Sons Merchandise Co.* (C. C. A. 8th), decided June 30, 1942 (1942 P. H., par. 62852); *Luziers, Inc., v. Nee*, 106 F. (2d) 130 (C. C. A. 8th), certiorari denied 309 U. S. 660; *Honorbilt Products, Inc., v. Commissioner*, 119 F. (2d) 797 (C. C. A. 3d); *United States v. Jefferson Electric Co.*, 291 U. S. 386; *Duradene v. Magruder*, 21 F. Supp. 426 (Md.), affirmed 95 F. (2d) 999 (C. C. A. 4th); *Houbigant, Inc., v. Commissioner*, 31 B. T. A. 954, affirmed 80 Fed. (2d) 1012 (C. C. A. 2d), certiorari denied, 298 U. S. 669. The Government, considering such proof insufficient, objected to the materiality of such statements on the ground that they were not the best evidence to show that the tax had not been passed on [R. 108, 137-138], the best evidence consisting, of course, of the books and records of the sales prices of Pacific during the period in question. Unless a taxpayer meets the specific requirements of the statute, no action can be maintained for the recovery of manufacturers' excise taxes.¹⁹ Section 621(d), Revenue Act of 1932; Art. 71, Regulations 46; *L. T. Piver, Inc., v. Hoey*, 101 F. (2d) 68 (C. C. A. 2d). The taxpayer failed to meet those requirements herein.

¹⁹Even in the event of recovery of manufacturers' excise taxes, interest thereon in no case may be allowed. Section 621(c), Revenue Act of 1932. While this section was amended by the Revenue Act of 1935 to allow 6% interest on such recoveries (Sec. 401(c)), the amendment has been held not to apply to payments made for any period prior to October 1, 1935 (S. T. 900, 1940-1 Cum. Bull. 247).

IV.

The Deduction or Credit Against Manufacturers' Excise Taxes Imposed by Section 602 of the 1932 Act, Allowed by Section 9(a) of the Agricultural Adjustment Act on Cotton on Which Processing Taxes Were Imposed and Paid Pursuant to That Section, Does Not Apply Also to Cotton on Which Floor Stocks Taxes Were Imposed and Paid Pursuant to Section 16 of That Act.

During the period here in question Pacific manufactured and sold tires containing approximately 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid a so-called floor stocks tax levied under Section 16 of the Agricultural Adjustment Act at the rate of approximately \$.04 per pound. In computing the manufacturers' excise tax imposed at the rate of \$.02¼ per pound by Section 602 of the 1932 Act on the manufacture and sale of tires, Pacific took deduction or credit therefrom for the floor stocks tax, already imposed and paid under Section 16, on the cotton contained in the tires although Section 16 makes no provision therefor. The credit or deduction thus taken for floor stocks tax in computing its sales tax under Section 602 was disallowed by the Commissioner of Internal Revenue, and assessment thereof as additional manufacturers' excise tax was made which, upon demand, Pacific paid under protest. Pacific thereupon filed claims therefor which were rejected by the Commissioner on the ground that the proper interpretation of Section 9(a) of the Agricultural Adjustment Act did not entitle Pacific to a credit for floor stocks taxes, previously paid on the cotton content of the tires, in computing the manufacturers' excise tax on the manufacture and sale thereof, and this suit followed.

The court below held that if Section 9(a) is read literally, its provisions restrict the credit against manufacturers' excise taxes to processing taxes alone since the so-called floor stocks taxes imposed but undefined by Section 16, for which no credit is allowed, do not come within the literal terms of Section 9. It stated that such construction, however, is erroneous and would lead to discriminatory taxation as between tire manufacturers and consequently, the several provisions of the Agricultural Adjustment Act and the intent of the Congress considered, and in order to avoid double taxation, the credit allowable under Section 9(a) for processing taxes is also allowable under Section 16(a) for floor stocks taxes and therefore Pacific would have been entitled to recover on the basis of its claims for floor stocks taxes; but, the court continued, the refund here sought is for an erroneously paid manufacturers' excise tax—and was so considered by the Government throughout, as shown by the record [R. 101]—which, under the facts herein, the taxpayer is not entitled to recover (for other reasons hereinbefore dealt with under Points I-III, *supra*). [R. 97-101.]

Inasmuch as the court below decided that Pacific and not the taxpayer was entitled to the claimed credit and the decision for the Government turned on other points previously dealt with, it may not be necessary for the Court to decide this point. If this Court should decide against the Government the other points presented and argued herein, then it is our position that despite the fact that Pacific paid the floor stocks tax on the possession of the cotton, under Section 16 of the Agricultural Adjustment Act, before it was included in the manufacture of the tires, it is nevertheless entitled to no deduction or credit therefor against the excise tax imposed by Section 602 of

the 1932 Act on the completed tires manufactured and sold.

The "processing tax" was, in the case of cotton, a tax on the spinning, manufacturing, or other processing (except ginning) of cotton. The "floor stocks" tax was, in the case of cotton, a tax on floor stocks of articles already processed wholly or in chief value from cotton and held for sale or other disposition by persons (other than retailers) on the date when the "processing" tax first took effect. The "floor stocks" tax was the equivalent in amount to the amount of the "processing" tax which would have been payable had the floor stocks been processed after the effective date of the "processing" tax. Sections 9, 16, Agricultural Adjustment Act. The statute itself supplies the definition for the word "processing," thus, "in the case of cotton, the term 'processing' means the spinning, manufacturing, or other processing (except ginning) of cotton * * *." Section 9(d)(2). Therefore, since the floor stocks tax is not a tax on "the spinning, manufacturing, or other processing" of cotton, it may not properly be characterized as a processing tax within the meaning of the Act.

The processing tax imposed by Section 9(a) is defined as a tax on the processing of articles and that section specifically allows a credit therefor against the sales or excise tax on the completed article when sold, to the extent that the processing taxed article has been included in the finished product. Thus Section 9(a) reads in part as follows:

* * * That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such

manufacturers' sales tax shall be computed on the basis of weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid.

The undefined but so-called floor stocks tax imposed by Section 16, however, is an excise tax on the *possession* of cotton articles held for sale. *Anniston Mfg. Co. v. Davis*, 301 U. S. 337. No provision is made in that section for a credit or deduction therefor, against the sales or excise tax on the finished article containing such "possession" taxed article, to the extent that the initially taxed article was included in the finished product, and none may be read into that section by implication, inference or otherwise merely because it appears in Section 9(a) for processing taxes. To construe the refund or credit provisions of Section 9(a), which specifically allow the credit, so as to include a like refund or credit for floor stocks taxes imposed by Section 16, for which no credit is specified therein, would be adding something entirely new, not in the statute, to the meaning of the word "processing" as it is meant and specified in the statute. This would be contrary to the strict statutory construction required, according to the specific terms of the statute, in cases claiming exemption from taxes, as herein. We are here confronted, not with the imposition of a tax, but with a claim to exemption therefrom, to accomplish which the taxpayer must bring itself clearly within the express terms of the statute. *Helvering v. Northwest Steel Mills*, 311 U. S. 46; *New Colonial Co. v. Helvering*, 292 U. S. 435. This it has failed to do. Moreover, the rule that ambiguities in a taxing statute are to be resolved in favor of the taxpayer, does not apply in determining what the taxpayer may deduct, credits and deductions from gross income being a

matter of legislative grace allowable only where the law clearly provides therefor. *New Colonial Co. v. Helvering*, *supra*; *Helvering v. Ins. Co.*, 294 U. S. 686; *Bagnall v. Commissioner*, 96 F. (2d) 956 (C. C. A. 9th).

The distinction between processing taxes and floor stocks taxes is further clearly shown by the treatment thereof in the 1936 Act which provides, among other things, that "no suit or proceeding * * * shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein" (Title VII, Revenue Act of 1936, Section 906(a)), and defines a processing tax as follows: "The term 'processing tax' means any tax or exaction denominated a 'processing' tax under the Agricultural Adjustment Act * * *" (*id.*, Sec. 913(b)). Upon the constitutionality of the provisions of Title VII of that Act being questioned in *Anniston Mfg. Co. v. Davis*, *supra*, the Supreme Court, upholding the right of Congress to require a taxpayer to present its claim for the recovery of processing taxes before the Board of Review, stated (p. 343):

With respect to floor stock taxes, no serious question is presented as to the adequacy of the remedy. The remedy by suit is expressly preserved. If the Commissioner refused refund, suit may be brought against the United States in the Court of Claims or in the District Court for the recovery of the amount claimed to have been illegally exacted.

Thus, a claim for the recovery of floor stocks taxes is not subject to the prohibition of Section 906(a) of the 1936 Act forbidding an action to be brought in any court for the recovery of processing taxes, and therefore under the

ruling in the *Anniston Mfg.* case, the term "processing tax," as used in the Agricultural Adjustment Act, does not include the tax on "floor stocks."

It is submitted, therefore, that the precise definition of the term "processing tax" as used in the Agricultural Adjustment Act and the ruling of the Supreme Court in the *Anniston Mfg.* case, together clearly negative any possible contention that the "floor stocks" tax as used in Section 16 of the Agricultural Adjustment Act may be used interchangeably with or in lieu of the "processing tax" as used in Section 9 of that Act, for the purpose of obtaining the credit or deduction claimed herein. Consequently, it follows, we submit, that the deduction or credit against the manufacturers' excise taxes imposed by Section 602 of the 1932 Act herein, allowed by Section 9(a) of the Agricultural Adjustment Act on cotton on which processing taxes were imposed and paid pursuant to that section, does not apply also to cotton on which floor stocks taxes were imposed and paid pursuant to Section 16(a) of that Act.

In view of the foregoing, we submit that (1) the assignments of its claims for refund against the United States made by Pacific to the taxpayer were ineffective under Section 3477, Revised Statutes, and therefore the taxpayer could not properly maintain the present action and is not entitled to recover; (2) the taxpayer is not entitled to maintain the instant action and to recover a refund because the grounds relied upon in the claims filed by Pacific with the Collector and alleged in the original petition differ materially from the new and unrelated grounds relied upon in the present suit; (3) the taxpayer is not entitled to recover since it was not "the person who paid the tax," nor has it established by requisite proof

that Pacific, the real taxpayer, did not pass the taxes in question on to its vendees, as required by the statute and regulations in order to recover; and (4) the deduction or credit, against manufacturers' excise taxes imposed by Section 602 of the 1932 Act, allowed by Section 9(a) of the Agricultural Adjustment Act on cotton on which processing taxes were imposed and paid pursuant to that section, does not apply also to cotton on which floor stocks taxes were imposed and paid pursuant to Section 16 of that Act.

Conclusion.

The judgment of the District Court is correct and in accordance with law and controlling authority. It should therefore be affirmed.

Respectfully submitted,

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August, 1942.

Signed by Mr. William

APPENDIX.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 602. TAX ON TIRES AND INNER TUBES.

There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:

(1) Tires wholly or in part of rubber, $2\frac{1}{4}$ cents a pound on total weight (exclusive of metal rims or rim bases), to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.

* * * * *

SEC. 621. CREDITS AND REFUNDS.

* * * * *

(c) In no case shall interest be allowed with respect to any amount of tax under this title credited or refunded.

(d) No overpayment of tax under this title shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.

Agricultural Adjustment Act, c. 24, 48 Stat. 31:

SEC. 9. (a) To obtain revenue from extraordinary expenses incurred by reason of the national eco-

conomic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: *Provided*, That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid.

* * * * *

(U. S. C. 1940, ed., Title 7, Sec. 609.)

SEC. 16(a). Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:

(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date.

(2) Whenever the processing tax is wholly terminated, there shall be refunded to such person a sum (or if it has not been paid, the tax shall be abated) in an amount equivalent to the processing tax with respect to the commodity from which processed.

* * * * *

(U. S. C. 1940 ed., Title 7, Sec. 616.)

Revised Statutes, as amended:

SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of

a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors. (U. S. C. 1940 ed., Title 31, Sec. 203.)

Treasury Regulations 46, promulgated under the Revenue Act of 1932:

ART. 71. *Credits and refunds.*— * * * The claim for credit or refund must be supported by evidence showing (1) the person who paid to the United States the tax for which credit or refund is claimed, (2) the date of payment, (3) the amount of such tax, and (4) the fact that the article was so used.

* * * * *

If any person overpays the tax due with one monthly return, he may either file a claim for refund on Form 843 or take credit for the overpayment against the tax due with any subsequent monthly return. In all cases (except those referred to in section 621 (a), discussed under the preceding paragraphs of this article) where a person overpays tax, no credit or refund shall be allowed, whether in pursuance of a court decision or otherwise, unless the taxpayer files a sworn statement explaining satisfactorily the reason for claiming the credit or refund and establishing

(1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has either repaid the amount of the tax to the ultimate purchaser of the article or has secured the written consent of such ultimate purchaser to the allowance of the credit or refund. In the latter case the written consent of the ultimate purchaser must accompany the sworn statement filed with the credit or refund claim. The statement supporting the credit or refund claim must also show whether any previous claim for credit or refund covering the amount involved, or any part thereof, has been filed with the collector or Commissioner.

* * * * *

a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors. (U. S. C. 1940 ed., Title 31, Sec. 203.)

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(1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has either repaid the amount of the tax to the ultimate purchaser of the article or has secured the written consent of such ultimate purchaser to the allowance of the credit or refund. In the latter case the written consent of the ultimate purchaser must accompany the sworn statement filed with the credit or refund claim. The statement supporting the credit or refund claim must also show whether any previous claim for credit or refund covering the amount involved, or any part thereof, has been filed with the collector or Commissioner.

* * * * *

No. 10035

IN THE 12
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE B. F. GOODRICH COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

APR 27 1942

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CLERK

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Revenue Act of 1936, Sec. 903.....	10
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TEXTBOOKS.

61 Corpus Juris, "Taxation," Sec. 71, p. 139.....	25
6 Cyclopedia of Federal Procedure, Sec. 2973, p. 580.....	16
16 Fletcher Cyclopedia of Corporations, Sec. 8224, p. 1038.....	3

No. 10035

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE B. F. GOODRICH COMPANY, a Corporation,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.¹

The Government's brief filed in this cause consists of four main points. Two of them purport to respond, in part at least, to the burden of our opening brief; the other two raise new points not discussed in our opening brief because they were issues upon which the trial court found in appellant's favor. It is apparent, therefore, that the decision of the trial court wholly pleased neither the taxpayer nor the Government.

We will dwell, herein, briefly upon those points, numbers I and III of the Government's brief, wherein answer is sought to be made to certain of the grounds for reversal urged by us in our opening brief; we will then turn to the new points, numbers II and IV, wherein it is contended by counsel for the United States that the trial court fell into error in deciding adversely to the Government the issues therein presented.

¹The correct citation of *Arkwright Mills v. Commissioner*, quoted at p. 73 of our opening brief is 127 Fed. (2d) 465.

I.

Revised Statutes, Section 3477, Does Not Invalidate Assignments by Operation of Law Pursuant to Dissolution.

In considering this point we cannot do better than rely upon the record itself; the very simple facts are, as disclosed in the record and indeed in the Stipulation of Facts itself [Tr. pp. 80-92], that the Pacific Goodrich Rubber Company had a claim against the Government for additional and excess manufacturer's excise tax, in the amount of \$16,450.39, which had been "erroneously, illegally and unjustly demanded and collected" from it [Conclusion of Law II, Tr. p. 154]; that it had but one stockholder, the Appellant herein [Stip. of Facts, Tr. p. 82]; that on June 30, 1934, it made an assignment to its parent and sole stockholder [Stip. of Facts, Tr. p. 83] of all of its assets including this right of refund; [Exhibit A, Tr. pp. 191-192]; that at a special meeting of its Board of Directors held on July 6th, 1934, as shown by certified copy of the minutes thereof,¹ it was resolved to dissolve the corporation and the delivery to Appellant of all of the assets of the corporation was ratified "as a distribution in kind to the stockholders of all the assets of this corporation" [Exhibit I, Tr. pp. 226-228]; that on the same day at a meeting of the stockholders it was recited that the corporation had transferred and delivered over to Appellant at the close of business on June 30, 1934 all of its assets "*in anticipation of the immediate*

¹Certified copies of the minutes of a corporation are *prima facie* evidence "of the facts or action stated therein." *Calif. Civil Code* Sec. 371; *People v. Ratliff*, 131 Cal. App. 763, 773; 22 Pac. (2d) 245; *Thermopolis N. W. Electric Co. v. Ireland* (10th C. C. A.), 119 Fed. (2d) 409, 411.

dissolution of the company" [Tr. p. 230]; that the stockholders thereupon voted to dissolve and ratified the transfer and delivery of the assets "as a distribution in kind of all the assets of the corporation to its stockholders, all of its issued and outstanding stock being owned and/or controlled by said The B. F. Goodrich Company." [Exhibit I-1, Tr. pp. 229-231]; that the corporation thereafter and on December 21, 1934 was formally dissolved [Stip. of Facts, Tr. p. 81].

When we recall that these certified copies of minutes, which the court found to be true and correct [Findings XIII and XIV, Tr. p. 147], are affirmative and probative evidence,¹ standing uncontradicted in the record, concerning the reason for and the nature of the assignment of June 30, 1934, we are not remiss in taking issue with Appellee when it so bluntly states "the first assignment, made six months before Pacific's dissolution, could not have been a distribution according to the resolutions of the directors and stockholders pursuant to dissolution," and "was merely a voluntary assignment for a consideration,"² having no possible relation to the subsequent dissolution" (Gov't. Br. p. 21). The unsupported statement of the advocate cannot substitute for the record.

¹See preceding footnote.

²The recital of consideration in the assignment betokens nothing: it clearly was not a monetary consideration because the assignment itself was of all assets of the Pacific Company including cash, bank accounts and receivables; being a distribution in anticipation of immediate dissolution the consideration, if any, would be the surrender by the sole stockholder of its stock for cancellation. As stated in 16 Fletcher Cyc. of Corps., §8224, p. 1038:

"A corporation may, before formal dissolution and while it still has a corporate existence, distribute its property and assets among its stockholders."

When counsel say (Gov't. Br. pp. 24-25), "But taxpayer herein is not shown to have been the actual successor to Pacific's claim against the United States other than by the statements in totally unrelated abatement claim which it filed in Akron, Ohio" they apparently choose completely to ignore the uncontradicted evidence in the record. The so-called "totally unrelated" claim to which they make reference [Tr. p. 239] was but further corroboration of the fact that the much maligned assignment was one step in the dissolution of the taxpayer and the distribution of its assets to its stockholder, the Appellant.

We will not requote the decisions, of which only a handfull of the more pertinent are included in our opening brief at pages 24 to 33 thereof; suffice it to remark here that the authorities are uniform in holding that a distribution (be it in the form of an assignment or otherwise) pursuant to a dissolution, like a transfer upon a merger or consolidation, is not that form of traffic in claims against the Government which R. S. §3477 was designed to prohibit.

See:

- Goodman v. Niblack* (O. B.¹ pp. 24-25);
- Novo Trading Co. v. Commissioner* (O. B. pp. 26-28);
- Roomberg v. United States* (O. B. pp. 28-30);
- Seaboard Airline Ry. v. United States* (O. B. pp. 30-31);
- Phillips, Collector v. Howe Films Co.* (O. B. p. 31);
- Kingan & Co. v. United States* (O. B. pp. 32-33);
- Sherwood v. United States* (2nd C. C. A.) 112 Fed. (2nd), 587, 592;
- Butler v. Goreley*, 146 U. S. 303, 36 L. Ed. 981, 986.

¹Opening brief.

And counsel for Appellee make no serious answer to the irrefutable alternative: if perchance the assignment was in fact null and void because within the prohibition of R. S. §3477 (which the record and the authorities above cited belie) then assuredly upon the dissolution of the Pacific Company this sole remaining asset would have passed to its stockholder, the Appellant herein, by operation of corporate law. See the authorities cited and quoted at pages 19 to 24 of our Opening Brief. Counsel for the Government, without the benefit of anything other than their own unqualified statement therefor, after observing that the assignment was "absolutely null and void" (R. S. §3477), state that it was "effective as between the parties to give the taxpayer the right of any potential chose in action against the United States so that the subsequent dissolution did not distribute this claim in kind" (Gov't Br. p. 21). Such a statement ignores the law (See *Spofford v. Kirk*, cited in footnote 2 at O. B. p. 18 and *National Bank of Commerce v. Downie*, 218 U. S. 345, 54 L. Ed. 1065) and ignores common sense. If, as R. S. §3477 holds, an assignee of a claim against the United States acquires no rights thereunder clearly nothing passes to him by a purported assignment and if nothing passes the claim remains where it was, an asset in the hands of the original claimant, which would then pass by operation of law to its stockholders on dissolution. "Accordingly, we may ignore the assignment by Durso to the surety and regard only the assignment which, on account of the situation of the parties, the law has effected." (*Morgenthau v. Fidelity & Deposit Co.*, 94 Fed. (2d) 632, 636. See O. B. pp. 23-24.)

II.

That the Additional Tax Was Not Added to the Price of the Tires With Respect to Which It Was Imposed or Collected From the Purchasers Thereof Was Properly and Sufficiently Established.

In point III of the Government's brief counsel seek in seven pages and five footnotes to answer three out of the four grounds urged by us for reversal of the decree below.

THE ADDITIONAL TAX COULD NOT HAVE BEEN ADDED TO THE PRICE OR COLLECTED FROM THE PURCHASERS.

It is said upon page 35 that Appellant is not entitled to recover in the absence of proof that the Pacific Company did not pass the taxes in question on to its vendees. Apart from the fact that this is a departure from the Statute (Section 621(d), Revenue Act of 1932, 26 U. S. C. A. §3343d) which requires proof not that the tax was not "passed on" but rather *that the taxpayer has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee,*¹ we have no particular quarrel with counsel's statement. But as we looked to the record to determine the nature of the assignment discussed in point I above, let us look to the record again to see whether or not this additional manufacturer's excise tax was or *could have been* included in the price of the tires upon

¹All italics ours unless otherwise indicated.

the sale of which it was imposed. The tires in question as found by the court, "were sold and billed to the purchasers * * * long before demand was made upon said company that it pay an additional manufacturer's excise tax" thereon [Finding XXII, Tr. p. 152] and at a time when neither "Pacific Goodrich Rubber Company or plaintiff contemplate(d) that Pacific Goodrich Rubber Company or plaintiff would be compelled to pay an additional manufacturer's excise tax." [Finding XXII, Tr. p. 151.] As if to make assurance doubly sure, the court further found "that after said additional tax had been demanded and paid no additional billing was made to said purchasers or vendees and no additional amount collected from them [Finding XXII, Tr. p. 152].

What better, what more conclusive proof that the additional tax was not "passed on," as counsel has it, could be adduced than the inevitable conclusion flowing from this chronology. This finding number XXII,¹ based as it is upon the stipulated evidence [Stip. of Facts, Tr. pp. 90-92], is so significant, so at odds with the conclusion of the court [Conclusion VII, Tr. p. 156], that we are setting it out verbatim in an appendix hereto.

As the Government's brief ignores the cogent significance of this factual proof so likewise does it ignore the pertinency and persuasive effect of those cases quoted by us at O. B., pages 38 to 42, where under similar circumstances the courts have held it *impossible* for the tax to have been added to the price where the sales antedated

¹Findings of fact are binding upon an Appellate Court unless clearly erroneous. Fed. Rules of Civ. Proc. Rule 52.

the tax and the tax itself was not in contemplation by the taxpayer.

Meeting with eloquent silence the almost conclusive effect of this sequence of events and the trial court's finding on the evidence, the Government's brief contents itself with urging anew that the taxpayer failed to produce its books of account and sales records. As this ground of objection has been quite exhaustively pursued in our Opening Brief at pages 43 to 55, we will content ourselves by referring again to those pages and to the last point of our Opening Brief (pages 69 to 74) wherein we urged that if more meticulous proof were in fact required the trial court abused its discretion in refusing permission to reopen.

Cases cited by counsel at Gov't. Br. p. 38 apparently for the proposition that verbal testimony in lieu of books and records is insufficient to establish that a tax has not been passed on are none of them even remotely in point, except *Duradene v. Magruder*, which curiously enough strongly supports our position that documentary evidence is not essential and was quoted from by us at O. B. p. 54. For the rest, the cases cited involved for the most part claims for refund under the A. A. A., were cases wherein the sales were made *after* the liability for the tax was known and, as found by the court in the respective cases, the taxpayer had increased his prices concurrently with the tax in an amount more than sufficient to cover the tax increase.

APPELLANT IS NOT PREVENTED FROM ESTABLISHING
THAT THE TAX WAS NOT PASSED ON.

Devoting one page of its brief thereto (pages 34-35), the Government contends that as Appellant is not "the person who paid the tax" *it is not entitled to maintain the action*. That, however, is not what the Statute says; rather it provides that no overpayment of tax under Chapter 209 of the Revenue Act of 1932 shall be refunded unless *the person who paid the tax establishes* that he has not included the tax in the price of the article with respect to which it was imposed. It is not a question of right to maintain the action (that question is raised, if at all, by the effect to be given R. S. §3477)¹ but is rather a requirement that the taxpayer establish that the tax has not been passed on.² Hence it is that the cases cited at pages 34 and 35 of the Government's brief have no pertinency whatsoever to the real issue, to wit: can appellant as successor in interest of the Pacific Company (the "person who paid the tax") establish the facts required to be shown to entitle it to a refund under Section 621(d) of the Revenue Act of 1932 (26 U. S. C. A. §3343(d)). See in this connection Point III of our Opening Brief (pages 56 to 68) and the authorities therein referred to.

Of the cases cited by the Government, *Cowpens Mfg. Co. v. United States* (D. C. So. Car.) 15 A. F. T. R. 794

¹Not to be overlooked is the fact that the *right to refund* of erroneously or illegally collected taxes is conferred by a separate and distinct statutory authority, R. S. 3220 (26 U. S. C. A. §3770(a)(1)) which in no sense limits the right of recovery to "the person who paid the tax"; see Opening Brief, pp. 67 and 68.

²We use the term only for brevity.

(Gov't Br., p. 34) involved not a consideration of Section 621(d) but of R. S. Section 3477 and raised only the question as to whether an assignee of the taxpayer *could maintain the action* for refund. The court there stated that a sale of the assets of a corporation and subsequent dissolution would not convey to the purchaser a claim against the United States because under the corporation law of South Carolina the liquidating trustees of the dissolved corporation were the proper parties to sue. Note how different is the instant case wherein there was not a sale of its assets by the Pacific Company to an outside third party purchaser but a distribution to its sole stockholder pursuant to dissolution.

Dalton Foundries v. United States (Ct. Cl.) 56 Fed. (2nd) 483 (Gov't. Br., p. 34) similarly involved *a sale* of corporate assets to an outside purchaser including a claim for refund against the United States which the court held to be within the prohibition of R. S. Sec. 3477.

We have no quarrel with the other cases cited by counsel on pages 34 and 35 of the Government's brief except that their pertinency to the case at bar is by no means apparent as is seen by the parenthetical comments made thereon by Government counsel.

In footnotes 16 and 17 on page 33 of the Government's brief counsel has inexcusably misconstrued our opening brief. We there pointed out (O. B. pp. 57-59) that substantially similar language in the Revenue Act of 1936 (Secs. 902 and 903) permitting refunds under the Agricultural Adjustment Act had been construed by the courts and, indeed by the Bureau of Internal Revenue itself as permitting a transferee of the taxpayer (as opposed to

the taxpayer itself) to prove that the tax had not been passed on to the vendees of the taxpayer. But says counsel in the footnotes in question, that Act and the authorities under it can have no application because we are not proceeding herein pursuant to that Revenue Act but pursuant to Sec. 621(d) of the Revenue Act of 1932. We readily grant the fact, but the persuasive analogy afforded both by the Bureau of Internal Revenue and the courts upon the interpretation to be given "substantially the same requirements" (Govt. Br., p. 33, footnote 16) in a later act affords a valuable precedent for the construction to be placed upon the requirements of Section 621(d).

III.

The Grounds Alleged as a Basis for the Refund of These Taxes in the Claims Filed and in the Complaint at Bar Are Identical. If There Be Any Variance the Government Waived its Right to Object.

Point II of the Government's brief presents a new issue in this cause. The United States complains of the decision of the trial court in concluding that in so far as there was any variance between the claims for refund filed with the Commissioner and the allegations of the First Amended Petition, the Commissioner by rejecting the claims upon the merits waived any technical variance [Conclusions of the Court on the Merits of the Action, Tr. pp. 102-103].

Although counsel in the Government's brief urges with considerable emphasis that the "grounds first advanced in the amended petition * * were new, unrelated and materially and fatally different from those included in its claim for refund" (Gov't. Br., p. 27), the only difference that can be pointed to is the fact that in the claims for refund filed by Appellant it set forth the assignment to it of June 30, 1934, but said nothing therein about the assignment having been made to it as sole stockholder of the Pacific Company pursuant to the dissolution of that company. In its First Amended Petition [Tr., pp. 50-77], which the court will recall was filed pursuant to a stipulation between the parties [Tr. pp. 78-79]¹,

¹"It is hereby stipulated * * * (a) That the petition and the amendment to the petition on file in the above entitled action may be amended in the particulars as set forth in Plaintiff's First Amended Petition presented herewith." [Tr. p. 78.]

Appellant elaborated upon the nature of and the circumstances surrounding the assignment and affirmatively alleged that it was made as and in evidence of a distribution of its assets in kind by the Pacific Company to Appellant, its sole stockholder [Tr. pp. 51-54]. The grounds upon which refund of the additional manufacturer's excise tax was claimed were in each instance identical, the sole difference lying in the greater elaboration contained in the complaint concerning the nature of the assignment made to the Appellant. As the fact of the assignment and the grounds upon which the refund was claimed appeared in the claims filed and the Commissioner was duly apprized thereof, we see no occasion for invoking any doctrine of waiver.

However, if there be any difference at all between the claims filed and the grounds urged for recovery of this tax in the First Amended Petition (and we are frankly unable to see any such different *grounds* for refund in the two documents) the Government has most assuredly waived its right to complain on that score, as the trial court concluded in its Opinion [Tr. pp. 102-103]. The Commissioner "rejected all claims for refund upon the broad ground that no right to refund existed in the taxpayer or the plaintiff under the Commissioner's interpretation of Section 9a of the Agricultural Adjustment Act" [Opinion of the Trial Court, Tr. p. 103, Finding XX, Tr. p. 150; see also the admission of counsel in the Government's Brief, page 39].¹ The Government stipulated

¹Counsel's assertion (Govt. Br. p. 31) that there could be no waiver because the Commissioner had not been apprized of the fact that the assignment was made pursuant to dissolution of the taxpayer and as a distribution of all assets to its sole stockholder is a manifest *non sequitur*. So far as appeared from the face of the claims (until explained in greater elaboration by the First Amended Petition [Tr. pp. 51-56]) the assignment relied upon was apparently in violation of R. S. Sec. 3477 yet the Commissioner chose to reject the claims upon the merits; the fact of the assignment appearing on the face of the claim necessarily presented to the Commissioner the issue of its validity as well as the strict merits of the claim itself, the same issues which were subsequently presented to the Court for determination.

that this amended complaint, elaborating upon the nature of the assignment (and, if need be, *adding* this so-called “entirely different ground” for refund) might be made and filed [Tr. p. 78]. It raised no objection to any purported variance by way of affirmative defense or otherwise in its answer [Tr. pp. 41-48]. It admitted, by failure to deny paragraphs VIII and IX of the amended complaint, that claims for refund in the form presented to the Commissioner had in fact been “duly filed” [Tr. pp. 58, 64]. There is no Finding of Fact or Conclusion of Law covering the alleged variance between the claim and the complaint and, as appears from the record herein, this ground of objection was neither presented nor urged by the Government in the trial court but is raised by it for the first time here on appeal [see Transcript, particularly p. 261 showing cause submitted on briefs rather than oral argument and note that the trial briefs on file herein make no mention of this ground of objection]. Finally, as counsel for the Government hopefully remarks in their brief, the time has long since expired when amended or more elaborate claims for refund might be filed. (Gov’t. Br., p. 28.)

Taken together or singly, these facts, the examination and rejection of the claims upon the merits, the stipulation for the filing of the amended complaint and the failure to raise or present the issue in the trial court, spell out a clear case of waiver of compliance with the Regulation, if indeed waiver need be relied upon at all.

Tucker v. Alexander, 275 U. S. 228, 72 L. Ed. 253, 256:

“If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously

he was not here, it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose."

Bethlehem Baking Co. v. U. S. (3rd C. C. A.) June 26, 1942 (1942 P. H. Fed. Tax Service, Par. 62,861):

"The examination and consideration of the claim on its merits constituted a waiver by the Commissioner of any objection as to the form of the submission. *Cudahy Packing Co. v. United States*, 37 F. Supp. 563, 570 (N. D. Ill.) reversed on other grounds, 126 F. (2d) 429 (C. C. A. 7)."

Con-Rod Exchange, Inc. v. Hendrickson, Collector (D. C. Wash.), 27 Fed. Supp. 427, 428:

"The Commissioner's consideration and denial of the claim, being upon the merits, constituted a waiver of the informality of plaintiff's claim in failing to comply with the Commissioner's regulation in the foregoing respect."

S. & R. Grinding Co. v. United States (D. C. Pa.), 27 Fed. Supp. 429, 430:

"The claims for refund were rejected on the merits, because the Commissioner found the plaintiff was liable for the tax, and not because the plaintiff had failed to allege in its claims for refund that the taxes paid were not included in the price of the articles sold, and were not collected from the vendees. See letters of the Commissioner rejecting the

claims [Exhibits III and IV] attached to the complaint.

“In that situation, we hold the Commissioner waived any departmental regulation requiring that claims for refund show the plaintiff had not included the tax in the price of the articles sold or collected the same from the vendee.”

University Distributing Co. v. United States, (D. C. Mass.) 22 Fed. Supp. 794, 800; *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 71; 77 L. Ed. 619, 625; *United States v. Garbutt Oil Co.*, 302 U. S. 528, 533; 82 L. Ed. 405, 409.

Furthermore, having failed to present this issue in any manner in the trial court (the consideration of the point in his opinion by the trial judge was purely *in invitum*), the Government has waived its right to complain and may not raise the question for the first time on appeal.

6 Cyc. of Fed. Proc. §2973 p. 580:

“Not only is review restricted to the judgment appealed from, but it is further restricted to such questions and issues as were made and considered below and there decided.” (See cases cited.)

Ex parte Kcizo Kamiyama (9th C. C. A.) 44 Fed. (2nd) 503, 505:

“It is a fundamental rule in the review of judicial proceedings that a party is not heard on appeal upon questions not raised in the trial court.”

Hormel v. Helvering, 312 U. S. 552, 556; 85 L. Ed. 1037, 1041.

IV.

The Exemption From Double Taxation Provided for in Section 9(a) of the Agricultural Adjustment Act Applies to the Tax Levied Under Section 16 as Well as to That Levied Under Section 9.

The fourth point of the Government's brief, admittedly presented by it only as an alternative ground of argument (Gov't. br., p. 40), is devoted to an attack upon Conclusion of Law I to be found at Transcript page 153. Therein the trial court concluded that under the proviso clause of Section 9(a) of the Agricultural Adjustment Act (7 U. S. C. A. §609(a))¹ the manufacturer's excise tax on tires imposed by Section 602 of the Revenue Act of 1932 (26 U. S. C. A. §3400) should be computed on the basis of the weight of said tires less the weight of the processed cotton therein on which either the tax imposed by Section 9(a) or the equivalent tax imposed by Section 16(a) of the Agricultural Adjustment Act had been paid. The bases for the trial court's conclusion are to be found in its opinion at Transcript pages 98 to 100. The Government urges that the proviso clause in Section 9(a) of the Agricultural Act is strictly limited to the tax levied under that section and has no application to the equivalent and counterpart tax levied under Section 16 of the Act.

¹"Provided, That upon any article upon which a manufacturers' sales tax is levied under the authority of chapter 20 of Title 26 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished articles less the weight of the processed cotton contained therein on which a processing tax has been paid."

Section 9(a) was the first section of the Act levying any tax for the purposes designed to be accomplished by the Agricultural Adjustment Act. The section stated:

“To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided.”

And at the end thereof was the proviso quoted in Footnote 1.

Section 15(e) of the Act levied upon commodities imported into the United States, during “any period for which a processing tax is in effect,” a tax “*equal to the amount of the processing tax* in effect with respect to domestic processing of such commodity into such an article at the time of importation.”

Section 16(a) of the Act (7 U. S. C. A. §616(a)) levied a tax, not named or defined in the section, upon any commodity held for sale or other disposition at the time when the processing tax first became effective as to such commodity, which tax was to be *the equivalent of the processing tax* which would have been payable had the commodity in question been processed on that date. Although not named or defined in the Act this last mentioned tax has for purposes of differentiation and convenience been commonly designated as the “floor stocks” tax.¹ It should be borne in mind, however, that Congress when it enacted the Agricultural Adjustment Act on May 12, 1933, made no such facile distinction between the

¹“The undefined but so-called floor stocks tax” as counsel for the Government express it. (Gov’t. Br. p. 42.)

levies. Indeed were it not for the label, "floor stocks tax," which usage has subsequently appended to the levy made under Section 16, there can be little question that Congress in employing the term "*processing taxes*" in Section 9(a) above quoted (* * "there shall be levied *processing taxes* as hereinafter provided.") clearly used it in the broad sense as inclusive of all equivalent levies made under the Act including the "compensating" tax on imports and the so-called "floor stocks" tax on commodities on hand.

Thus the Senate Committee on Agriculture and Forestry in reporting the bill (H. R. 3835) to the Senate on April 5, 1933, the bill then containing provisions for the so-called "compensating" tax and "floor stocks" tax, stated, "In order to obtain funds to pay the farmer for lands thus leased, it is proposed under the leasing provision of this part² to levy and collect what is known as a *processing tax* from the processor of farm products." (Senate Reports on Public Bills, 73rd Congress; Report No. 16.) It is significant that no mention was made in the report of the so-called "compensating tax" and "floor stocks" tax and that all tax levies under the Act were treated in the aggregate as "a processing tax."

UNJUST DISCRIMINATION WOULD RESULT FROM APPELLEE'S SUGGESTED RESTRICTION.

Furthermore, it is apparent from a consideration of these three taxing provisions in the Act that Congress sought assiduously to equalize the burden of the tax so

²Title I.

that no class, processors, importers or persons with large stocks of goods on hand would be discriminated against or in favor of when the Secretary of Agriculture should proclaim the tax in effect with respect to any particular agricultural commodity.

This purpose appears from the report of the Committee on Agriculture of the House dated March 20, 1933, wherein there was included in the bill for the first time the forerunner of what subsequently became Section 16(a). On page 5 of this Report under a heading "Supplemental Revenue Provisions" (House Reports on Public Bills, 73rd Congress; Report No. 6), the Committee stated:

"In order to make effective the operation of the tax provisions and to *prevent unfair discriminations* resulting therefrom, certain supplemental revenue provisions are included in the bill. These are as follows: * * *

"(c) There is levied upon floor stocks, when the processing tax first goes into effect with respect to any commodity, a tax equal to the processing tax which would have been payable with respect to the commodity from which the floor stocks are processed if their processing had occurred when the processing tax was in effect. A corresponding refund is provided on floor stocks when the processing tax finally terminates. * * *

"*The above supplemental revenue provisions serve * * * to prevent unfair competition within any industry.*"

It appears again in a report upon the Revenue Bill of 1936 wherein the Committee on Ways and Means stated:

"The Agricultural Adjustment Act provided for a floor-stocks tax on the effective date of the processing tax *in order that all articles, the product of a commodity subject to the processing tax, should move into the channels of trade equally taxed.*" (House Report No. 2475 dated April 12, 1936; 1939-1 Cum. Bull. Part 2, page 677.)

With this intent on the part of the Congress to avoid any unjust discrimination evidenced so unmistakably, it argues strange for the Government now to seek a construction of the Act which would be patently discriminatory between large groups of persons in the same class. If the proviso clause in Section 9(a) be as strictly limited in its application as counsel urges those tire manufacturers, for example, who had a large inventory of cotton on hand on August 1st, 1933 would be required to pay an additional tax of $2\frac{1}{4}$ cents per pound thereon when they sold their tires as against the manufacturers whose inventories were low on August 1st, 1933 and into whose tires went only cotton on which the particular tax levied under Section 9 as opposed to Section 16 had been paid. To illustrate: the one class of manufacturers, counsel urges in effect, would be entitled to compute their manufacturer's sales tax on the weight of the tires sold less the weight of the processed cotton therein; the other class of manufacturers, having any considerable stock of cotton on hand on August 1st, 1933, upon which incidentally, they would have paid an identically equivalent tax (approximately $4\frac{1}{2}$ cents per pound) under Section 16 of the Agricul-

tural Adjustment Act as their competitors would have paid under Section 9, would find themselves in the unenviable position of paying still another levy of $2\frac{1}{4}$ cents per pound on this same cotton under the Manufacturer's Excise Tax of 1932 while their competitors escaped free. We cannot ascribe to Congress an intent to discriminate thus between persons in the same class when the attempt to avoid all such discrimination in the Act is so clearly manifest.

United States v. American Trucking Ass'n., 310 U. S. 534, 543; 84 L. Ed. 1345, 1351:

"Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."

Osawa v. United States, 260 U. S. 178, 194, 67 L. Ed. 199, 207:

"It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail."

Helvering v. Morgan's Inc., 293 U. S. 121, 126, 79 L. Ed. 232, 236:

"But the true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part." (*Helvering v. New York Trust Co.*, 292 U. S. 455, 464; 78 L. Ed. 1361, 1366.)

The language of the trial court in its opinion cannot, we believe, be improved upon in this connection and we take the liberty of quoting briefly therefrom to this court:

"In my opinion, an examination of Title I of the Agricultural Adjustment Act with the aid and in the light of the correlative legislative history and material which led up to this remedial law, clearly shows the error and injustice of the contention that the deduction computation provided in Section 9 is inapplicable to the unnamed tax imposed by Section 16, or that deductions under Section 9 should be confined to specifically defined 'processing' taxes according to the letter of the law. To so restrict the application of Section 9a would utterly destroy the chief factor present in the legislative mind in making omnibus provisions to prevent tax discrimination between tire manufacturers without any real differentiation of business activity in or use of fabricated commodities. See *United States v. Dickerson*, 310 U. S. 554. * * *

"To construe the refund or credit provisions of the Triple A so as to include the so-called 'floor stock' taxes as well as the statutorily defined 'processing'

taxes instead of adding 'something entirely new to the meaning of the word "processing," as it is used' in the statutes, as argued by the Government, merely sheds light upon what appears from reading the whole of Title I to have been the painstaking purpose of Congress—namely, the prevention of discrimination and double taxation." [Tr. pp. 98-99.]

A STATUTE IN AVOIDANCE OF DOUBLE TAXATION IS TO
BE LIBERALLY CONSTRUED.

Much is said in the Government's brief about what counsel variously terms the "credit," the "exemption" or the "deduction" permitted under the proviso clause of Section 9a and cases are cited to the effect that credits and deductions from gross income, being matters of Legislative grace, are to be strictly construed against the taxpayer. (Gov't. Br. pp. 42-43.) But the proviso in question is clearly neither a credit nor a deduction. It provides that in computing the manufacturer's sales tax, imposed under another and different Act, one may exclude from the weight of the article sold the weight of processed cotton contained therein on which a processing tax has been paid. The proviso is properly in the nature of an exemption granted under the terms of a later statute expressly to avoid double taxation upon the same commodity by virtue of an earlier Act. Designed, as it manifestly is, to avoid double taxation it should receive not the strict construction applicable to credits and deductions from gross income under the Revenue Acts (as witness the cases cited by Gov't Br. pp. 42-43) but a liberal construction to effectuate the purpose of the Congress.

61 *Corpus Juris*, "Taxation" §71, p. 139:

"The presumption is against the intention of the legislature to impose double taxation on the same property, and prevails unless overcome by the express words of the statute. Any construction of a taxing statute which results in taxation of the same property twice is to be avoided if possible, and never to be adopted unless necessary to effect the manifest intent of the legislature;"

Tennessee v. Whitworth, 117 U. S. 129; 29 L. Ed. 830, 832:

"Double taxation is, however, never to be presumed. Justice requires that the burdens of government shall as far as is practicable be laid equally on all; and if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person. Sometimes tax laws have that effect, but if they do it is because the Legislature has unmistakably so enacted. All presumptions are against such an imposition."

United States v. Supplee-Biddle Hardware Company, 265 U. S. 189, 195; 68 L. Ed. 970, 975:

"The result of the construction put by the Government upon §§233, 230, and 213 would be to impose a double tax on the proceeds of the two policies in this case over and above \$40,000.—*i. e.*, an income tax and an estate tax. Such a duplication even in an exigent war-tax measure, is to be avoided unless required by express words."

Helvering v. Bliss, 293 U. S. 144, 150; 79 L. Ed. 246, 251:

“The exemption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer’s favor, were begotten from motives of public policy, and are not to be narrowly construed.”

The trial court in its opinion expressed the same thought when it said:

“We have been unable to find from an analysis of the applicable tax statutes any reason why the Congress should desire to relieve the manufacturers of the burden of double taxation where one tax is a processing tax and the other is a sales tax and not to relieve the same manufacturers of double taxation when one of the taxes is a so-called ‘floor stock tax’ and the other is a sales tax; therefore, the danger of going beyond the literal interpretation of a taxing statute, adverted to in *United States v. American Trucking Assn.*, *supra*, is not present in the consideration of the tax legislation pertinent to this action.” [Tr. p. 99.]

We conclude therefore that Congress in employing the term “processing tax” in the proviso clause of section 9(a) used the term in the general sense as including not alone the tax on “processing” but also the undefined and similar levy made under Section 16(a) on stocks on hand and that this must necessarily be so to avoid a clear and unjust discrimination and to give effect to the obvious intent to avoid a double tax upon the same commodity.

CONCLUSION.

In urging a reversal of the judgment appealed from we would emphasize again that the decision so far as concerns the merits was in favor of the taxpayer; it found that the additional manufacturer's excise tax was unjustly and improperly demanded and collected; that the taxpayer was properly entitled to deduct from the weight of its tires sold the weight of processed cotton therein on which it had paid a tax under the AAA. Judgment was, however, rendered in favor of the Government upon what we believe to be technical and erroneous grounds: (a) that the assignment of this claim for refund was void under Rev. Stat. §3477 (but the uncontroverted evidence showed that the assignment was but part of a distribution of all assets of the taxpayer to its sole stockholder pursuant to dissolution, a well recognized exception to the statute); (b) that the books and records were not produced to show that the additional tax was not passed on (but the court's finding that the tires were all sold before the additional tax was even in contemplation by the taxpayer proved that this extra tax could not have been added to their price); and (c) that appellant because it was not "the person who paid the tax" could not establish the facts required to be shown under Section 621(d) (but the authorities have uniformly permitted a transferee of the taxpayer to establish that a tax has not been passed on and have classified a transferee of the taxpayer as the taxpayer himself for such purposes).

We believe, therefore, that the judgment cannot properly stand and that the \$16,450.39 "erroneously, illegally and unjustly demanded and collected" should be ordered refunded with interest.¹

Respectfully submitted,

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¹Interest is allowable: *Carter v. Liquid Carbonic Pac. Co.* (9th C. C. A.) 97 Fed. (2d) 1, 5; in any event, it is allowable at the rate of 6% per annum from Oct. 1st, 1935; Sec. 621(c) Rev. Act of 1935; 26 U.S.C.A. §3443(c).

APPENDIX.

Finding of Fact XXII [Tr. pp. 151-152].

That throughout the period from August 1, 1933, to April 10, 1934, the Pacific Goodrich Rubber Company was informed and believed that, for the purpose of computing the manufacturer's excise tax on tires manufactured and sold by it, it was entitled under the provisions of Sec. 9(a) of the Agricultural Adjustment Act to deduct from the weight of the tires so sold the weight of the processed cotton contained therein upon which a tax had been paid either under Sec. 9(a) or Sec. 16 of the Agricultural Adjustment Act; that Pacific Goodrich Rubber Company and plaintiff at all times prior to said April 10, 1934, believed that the tax burden with respect to such tires would amount to \$0.044184 on the processed cotton contained in said tires and 2¼ cents per pound on the remaining weight of said tires; that at no time during the period preceding April 10, 1934, did Pacific Goodrich Rubber Company or plaintiff contemplate that Pacific Goodrich Rubber Company or plaintiff would be compelled to pay an additional manufacturer's excise tax of 2¼ cents per pound on the weight of the processed cotton contained in said tires and on which had been paid a floor stocks tax under Sec. 16 of the Agricultural Adjustment Act. That all tires containing processed cotton which was held for sale or other disposition by the Pacific Goodrich Rubber Company on August 1, 1933, were sold and billed to the purchasers or vendees of the Pacific Goodrich Rubber Company long before demand was first made upon said company that it pay an additional manufacturer's excise tax of 2¼ cents per pound on the weight of the processed cotton contained in said tires, and that after said additional tax had been demanded and paid no additional billing was made to said purchasers or vendees and no additional amount collected from them.

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No. 10035.

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

B. F. GOODRICH COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL BRIEF FOR THE UNITED
STATES.

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OCT 30 1942

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SUPPLEMENTAL BRIEF FOR THE UNITED
STATES.

At the argument of this case, the Court directed counsel for the United States to file a further brief setting forth the additional arguments and authorities which counsel was then presenting in support of the decision below. This brief is accordingly submitted.

I.

The Taxing Provisions of Section 9 (a) of the Agricultural Adjustment Act Having Been Declared Unconstitutional and Void, the Provisions of the Proviso Clause of Section 9 (a) Are Likewise Void and Appellant Can Take No Benefit Under Them.

The manufacturers' excise tax, imposed by Section 602 (1) of the Revenue Act of 1932, recovery of which is sought in this action, is a valid and constitutional tax. The Agricultural Adjustment Act taxes, both the tax imposed as a processing tax (by section 9 (a)) and the floor

stocks taxes (imposed by section 16 (a)) were unconstitutional. *United States v. Butler*, 297 U. S. 1. Appellant attempts here to claim a credit against valid manufacturers' excise taxes by virtue of and pursuant to a provision of an act which has been declared unconstitutional. Moreover the recovery is sought not by the taxpayer, who paid the manufacturers' excise taxes,¹ but by another, the B. F. Goodrich Company, and upon grounds not set up in appellant's claims for refund.

In the court below this action was defended upon the ground, among others, that neither the taxpayer nor the B. F. Goodrich Company, appellant, could recover valid manufacturers' excise taxes pursuant to a provision in some other act which has been held unconstitutional. We defend this action here and the decision below upon the same ground, as we may, in accordance with the established principle that "a respondent or an appellee may urge any matter appearing in the record in support of a judgment * * *". *Le Tulle v. Scofield*, 308 U. S. 415, 421. See also *Ryerson v. United States*, 312 U. S. 405, 408; *Helvering v. Lerner Stores Co.*, 314 U. S. 463. In the latter case the Supreme Court pertinently observed (pp. 466-467):

"The Board and the Circuit Court of Appeals ruled adversely to respondent on these constitutional issues. Respondent filed no cross petition for certiorari. Yet a respondent, without filing a cross petition, may urge in support of the judgment under review grounds rejected by the court below." (Citing several cases.)

¹By "taxpayer" is meant, in this brief, the Pacific Goodrich Rubber Company. Its tax liability is involved, and it paid the taxes for which this suit was brought. It was the taxpayer. The B. F. Goodrich Company was not the taxpayer and it will be referred to herein as the "appellant".

The trouble with appellant's case is that it is claiming against or in the computation of a valid manufacturers' excise tax a benefit or a credit or an allowance (call it what you will) prescribed by an unconstitutional statute. The real grievance of the *taxpayer* is that unconstitutional floor stocks taxes were exacted from it under the Agricultural Adjustment Act. That is its grievance. (Of course, it may have passed those taxes on to its customers, in which event the taxpayer would have no actionable grievance.) But appellant does not assert that grievance nor sue for the recovery of the taxpayer's Agricultural Adjustment Act taxes. Appellant sues for manufacturers' excise taxes and claims a benefit against those taxes under and by virtue of a provision of an unconstitutional act. This it may not do, for it is settled that the declaration by the Court of the unconstitutionality of a statute obliterates the legislative action as if the statute had never existed.

An early leading case on this is *Norton v. Shelby County*, 118 U. S. 425. There the Supreme Court said (p. 442):

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

The case of *Chicago Ind. & L. Ry. Co. v. Hackett*, 228 U. S. 559, is likewise pertinent. In that case the Supreme Court referred to its former decision that the act of Congress of June 11, 1906 (the first Federal employer's liability act), was unconstitutional and that the provisions

of that act were so interblended in the statute that they were incapable of separation. It then said (p. 566):

“That Act was, therefore, as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law.”

The opinion then concluded (p. 567):

“* * * a void statute, * * * was not law for any purpose.”

So, also, in *Peters v. Broward*, 222 U. S. 483, the Supreme Court said (p. 495):

“* * * the invalidity of the act disposes of every right which might otherwise proceed from it.”

Cooley's Constitutional Limitations, 8th Ed., Vol. I, p. 382, states:

“Where a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built upon it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be treated as if it had never, at any time, been possessed of any legal force.”

An analogous case is *Beckers v. United States*, 42 Fed. (2d) 300 (C. Cls.), certiorari denied 282 U. S. 882, where a taxpayer claimed certain rights under the provisions of an unconstitutional statute. The controversy concerned the taxpayer's right to a certain type of cost

basis on the sale of stock. This cost basis had been provided for by provisions of the Revenue Acts of 1916 and 1918, which provisions had declared *stock dividends* to be taxable as income, and had later been declared unconstitutional. (*Eisner v. Macomber*, 252 U. S. 189.) The Court in denying the taxpayer's contention cited *Norton v. Shelby County*, *supra*, and then concluded (p. 303):

"In view of this record it is difficult to perceive wherein under the revenue acts plaintiff may claim a deduction from the sales price of a value fixed by the terms of an act which the Supreme Court held to be unconstitutional."

Thus we submit that the taxpayer and appellant have *misconceived their remedy*; they should have filed claims for refund of the unconstitutional floor stocks taxes, aggregating \$34,648.08, which taxpayer paid in 1933 and upon denial of such claims, *if* denied and not allowed *and if* taxpayer had absorbed the floor stocks taxes and not passed them on, then taxpayer² should have followed the established procedure for recovering the floor stocks taxes. Venue for such recovery would lie in the United States Court of Claims or in the appropriate United States District Court, and not with the Processing Tax Board. *Anniston Mfg. Co. v. Davis*, 301 U. S. 337.

But one possible objection can be suggested to what has just been said, namely, that perhaps the credit provisions of Title I of the unconstitutional Agricultural Adjustment Act were *severable* from the provisions of Title I imposing processing taxes (section 9 (a)) and floor stocks taxes (section 16 (a)), particularly in view of section 14

²See in this connection Section 2074, Revised Code of Delaware, 1935 (Chap. 65, Sec. 42).

of Title I of the Agricultural Adjustment Act providing that "If any provision of this title is declared unconstitutional * * * or invalid, the validity of the remainder of this title * * * shall not be affected thereby".

The separability clause has some application, viz., to Part 1 of Title I, involving Cotton Option Contracts, and to the interstate market provisions later provided by amendment,³ but not to the *taxing scheme* of Part 2, all of which went out under the *Butler* case, *supra*.

Obviously the credit provision is a proviso to or limitation upon section 9 (a) imposing a processing tax. Significantly there is no credit provision hooked to section 16, which section alone imposes the floor stocks taxes. Both the processing tax imposed by section 9 (a) and the floor stocks taxes provided by section 16 were declared and held unconstitutional by *United States v. Butler, supra*. Thus the entire *taxing* provisions were struck from the statute. When they went, we submit that nothing of them remained, certainly no part of the floor stocks tax provisions for they carried no credit proviso, and similarly with the collapse of the processing tax, provided by section 9 (a), the credit provided in the case of *true processing taxes* likewise collapsed. A severability clause, the Supreme Court has said, is "but an aid to interpretation and not an inexorable command"; it establishes a presumption of divisibility; "and this presumption must be overcome by considerations that make evident the inseparabil-

³*Edwards v. United States*, 91 Fed. (2d) 767 (C. C. A. 9th).

ity of the provisions *or the clear probability that the legislature would not have been satisfied with the statute unless it had included the invalid part. Williams v. Standard Oil Co.*, 278 U. S. 235, 241-242."

Under either presumption, however (that of indivisibility or that of severability), the Supreme Court has said, "the determination, in the end, is reached by applying the same test—namely, What was the intent of the law-makers?" *Carter v. Carter Coal Co.*, 298 U. S. 238, 312.

The controlling question is whether Congress would have passed *the proviso clause* of section 9 (a) of the Agricultural Adjustment Act *if* the rest of section 9 (a), imposing the processing taxes, had not been passed. We submit to Your Honors that if Congress had known that it was not levying a tax, *it would never have provided a credit or benefit on account of a tax which it did not impose.*

Congress thought it had imposed a processing tax and, having done so, it added as a proviso to the section the provision for crediting the weight of processed cotton "on which a *processing tax* has been paid" against the weight of the finished article (tires) upon which a manufacturers' excise tax must be paid. (Italics ours.) Thus the credit provision is inextricably bound up with the processing tax provision. The credit or benefit or allowance, if any, is absolutely dependent upon and *assumes a valid collection of "processing" tax.*

A clearer case of inseparability could not be imagined. Certainly Congress would not have enacted the credit

provisions if it had known that the tax which it sought to impose by the Agricultural Adjustment Act could not legally be collected. Their reaction would have been—"No tax, No credit".

Carter v. Carter Coal Co., 298 U. S. 238, is an analogous case. The Supreme Court held that the price fixing provisions of section 4 of the Bituminous Coal Conservation Act of 1935 were so interwoven with the invalid labor-regulation provisions of the *same section* of the act that, the latter provisions being unconstitutional, the former were also invalid. In that act, as in this, there was a so-called separability clause, the clause being section 15 of that act. But, notwithstanding such provision, the Court there said (p. 316) that the price fixing provisions were so related to and dependent upon the labor provisions "as to make it clearly probable that the latter being held bad, the former would not have been passed. The fall of the latter, therefore, carries down with it the former. *International Textbook Co. v. Pigg*, 217 U. S. 91, 112-113."

Thus, when it be recognized that the credit proviso of section 9 (a) is inseparable from the rest of section 9 (a), it is clear that the appellant is claiming under an unconstitutional statute a benefit or a credit or an allowance (call it what you will) against a perfectly valid manufacturers' excise tax. This *it* cannot do. *Taxpayer* owed manufacturers' excise taxes in the full amount; it did not owe floor stocks taxes. It should have filed claims for refund of its \$34,648.08 of floor stocks taxes—and perhaps it has done this—and then, *if* the taxpayer itself absorbed the floor stocks taxes and did not pass them on, an action for the proper relief. Neither it nor the appellant may maintain any such action as this.

II.

On the Merits, and Even if the Proviso Clause of Section 9 (a) of the Agricultural Adjustment Act Be Deemed Separable From the Taxing Provisions of Section 9 (a), the Taxpayer Could Not Credit the Weight of Cotton on Which It Paid Floor Stocks Taxes Under Section 16 Against the Weight of Tires Subject to Manufactures' Excise Tax Under Section 602, of the Revenue Act of 1932.

The District Court held against the Government on this issue [R. 98-99], but we believe that the decision should have been for us. If this Court agrees with the Government then the decision below must, in any event, be affirmed. Two observations seem appropriate with respect to the issue:

(1) Section 9 (a) of the Agricultural Adjustment Act levied a processing tax (later declared to be unconstitutional) "upon the first domestic processing of the commodity". Section 9 (d) (2) *defined*, in the case of cotton, the term "processing" as meaning "the spinning, manufacturing, or other processing (except ginning) of cotton;" * * *. The section was prospective in its operation.

The proviso clause of section 9 (a) extended the credit or benefit, in the situation set forth, where "*a processing tax* has been paid". (Italics ours.)

A floor stocks tax (under section 16), however, is *not* a processing tax within the statutory definition, for the latter tax is only upon "the spinning, manufacturing, or

other processing (except ginning) of cotton". A floor stocks tax may be a kind of companion tax, a second cousin to a processing tax, but it is not a processing tax. The statutory definition is clear and *must control*. Cf. *Fox v. Standard Oil Co.*, 294 U. S. 87, 95-96, where a West Virginia statute defined "store" as used in its taxing act.

"* * * we must apply the statute as we find it, leaving to Congress the correction of asserted inconsistencies and inequalities in its operation."

McClain v. Commissioner, 311 U. S. 527, 530.

Similarly in *Scaife Co. v. Commissioner*, 314 U. S. 459, the Supreme Court said (pp. 462-463):

"We are dealing with an Act of Congress. * * * If we were to grant petitioner the extension which it asks, we should be performing a legislative or administrative, not a judicial, function."

See, also, *Crooks v. Harrelson*, 282 U. S. 55, 60.

A tax on "the first domestic processing", as defined by section 9 (a), is not a tax on something already manufactured and standing on the floor, which contains already processed materials. And *vice versa*. Hence the credit provided under section 9 (a) in instances where a "processing tax has been paid" is not a provision for a credit or benefit or allowance on account of floor stocks taxes paid.

(2) Moreover, and significantly, the Revenue Act of 1936 established a specific procedure for the recovery of

“processing taxes”, and that procedure is different from the procedure for recovering floor stocks taxes. Claims for refund must be filed for each, but *action* to recover “processing tax as defined * * * under the Agricultural Adjustment Act” (section 906, Revenue Act of 1936) lies only before the Processing Tax Board, whereas the venue for the recovery of floor stocks taxes is the United States District Court or the Court of Claims (Sec. 905).

Thus Congress has unmistakably reiterated that by “processing taxes” under the Agricultural Adjustment Act it meant one thing, and by “floor stocks” taxes it meant another.

And the Supreme Court recognized this distinction in *Anniston Mfg. Co. v. Davis*, 301 U. S. 337. Thus under this ruling of our Supreme Court the term “processing tax” as used in the Agricultural Adjustment Act does not include the tax on “floor stocks”. This ought to be conclusive. Thus the credit or deduction or benefit granted by section 9 (a) on account of the cotton “on which a processing tax has been paid” could never extend a credit or deduction or allowance for cotton on which “floor stocks” taxes have been paid.

III.

The Claims for Refund Were Not Sufficient.

Without repeating them here, the Government incorporates by reference the additional arguments and defenses to this action which are set forth in its original printed brief, particularly in sections II and III of the argument of that brief.

Supplementing what was there said, we point out that not until many years after taxpayer had paid the “manufacturers’ excise taxes”, now sued for, did the appellant make any representation that it had succeeded to the taxpayer’s rights by anything other than the attempted specific assignments of June 30, 1934 [Ex. A, R. 191-193] and of August 14, 1935 [Ex. B, R. 194-196]. Even appellant’s first amended petition [R. 49-78] filed February 5, 1940, on the very eve of trial, said nothing about a claim to taxpayer’s rights by operation of law *as a result of dissolution of the taxpayer*. The amended petition thus filed (more than five years after payment of the tax) alleged [R. 51] title by operation of law, pursuant to a distribution in kind to appellant as the sole owner of all of taxpayer’s issued capital stock and set up the 1934 and 1935 “assignments”, so-called, as evidence of that distribution. At the trial it developed that the taxpayer had been dissolved, December 21, 1934. [Ex. J, R. 234-235.] Of course, no claim for refund ever set up appellant’s claim to title by operation of law upon and by virtue of a dissolution of the taxpayer, a wholly owned subsidiary. Recovery was thus attempted by the appellant upon

grounds never set up in a timely or in any claim for refund which it had filed. Cf. cases cited footnote 14, p. 28, of the Government's original brief. See, also, *Pelham Hall Co. v. Carney*, 111 Fed. (2d) 944, 949 (C. C. A. 1st).

Conclusion.

The District Court did not err in holding that appellant was not entitled to recover in this action. The judgment below should be affirmed.

Respectfully submitted,

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October, 1942.

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REPLY TO APPELLEE'S SUPPLEMENTAL
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No. 10035

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE B. F. GOODRICH COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY TO APPELLEE'S SUPPLEMENTAL
BRIEF.

In the maze of legal issues involved in this appeal there is a tendency to lose sight of the basic equity underlying appellant's cause; the Government has collected from the taxpayer, retains and has not refunded taxes of \$51,098.47. Of that amount \$34,648.08 was paid as a tax upon an inventory stock of processed cotton under the Agricultural Adjustment Act [Finding IX, Tr. p. 144]. No portion of that amount has been refunded or credited to appellant or to appellant's predecessor in interest, Pacific Goodrich Rubber Company [Finding IX, Tr. p. 144], although no dispute exists as to the illegality of that exaction. (*United States v. Butler*, 297 U. S. 1; 80 L. Ed. 477; Supplemental

Brief of Appellee p. 3.) The balance of the amount, to wit, \$16,450.39, represents a tax with interest thereon computed upon the weight of the same processed cotton which was demanded and collected under the Manufacturer's Excise Tax (Sec. 602, Revenue Act of 1932; 26 U. S. C. A. Sec. 3400). This additional manufacturer's excise tax, the recovery of which alone is sought in this action, was found by the trial court to have been "erroneously, illegally and unjustly demanded and collected" [Conclusion II, Tr. p. 154]. If the Sovereign Government is subject to the same fundamental principles of equity and fair dealing which govern the transactions of individuals,¹ good cause and persuasive cause must be shown by the Government why it should not refund its illegal exaction.

With this basic thought held firmly in mind, let us examine the reasons advanced by the Government for its refusal to make this refund.

I.

The Unconstitutionality of the Agricultural Adjustment Act Is but an Added Reason Why a Refund Should Be Made in This Case.

As a ground of denial, not relied upon by the Commissioner of Internal Revenue in denying the claims for refund [Ex. H-1, H-2 and H-3, Tr. pp. 221-225; Finding XX, Tr. p. 150], advanced for the first time in the trial court and by it summarily dismissed [Opinion, Tr. pp. 100-101; Conclusion IV, Tr. p. 154], abandoned by the

¹*McKnight v. United States*, 98 U. S. 179, 25 L. Ed. 115, 116, "With few exceptions growing out of public policy, the rules of law which apply to the Government and to individuals are the same. There is not one law for the former and another for the latter."

Government in its brief on appeal² and resurrected by it on oral argument, the Government urges in effect that because the processing taxes it exacted were illegal the protection granted by Congress in the proviso clause of Section 9 (a) of the Agricultural Adjustment Act against double taxation of the same commodity was unavailing; that hence it may retain both the illegally collected processing taxes and the additional manufacturer's excise tax. Such an argument makes up certainly in ingenuity what it lacks in moral considerations.

Apart from its glaring inequities, this argument of counsel might be troublesome were it not for the weakness of the two pillars upon which it rests. It assumes that the doctrine of *Norton v. Shelby County*, 118 U. S. 425, is still the untrammelled, unquestionable law of the realm, and it assumes that Congress, in exempting from double taxation commodities upon which a processing tax had been paid, intended to exempt such commodities only if the processing tax was *validly* collected.

Considering the latter assumption first: the proviso clause of Section 9 (a) of the Agricultural Adjustment Act, upon which the taxpayer relied for its right to deduct from the weight of the tires it sold the weight of processed cotton contained therein on which it had paid a tax under Section 16 of the Agricultural Adjustment Act, had for its very obvious and manifest purpose the protection of the taxpayer from subjection to a double tax under two separate laws upon the weight of the same commodity (see Appellant's Reply Brief, Point IV, pp.

²"Counsel did not deem the question of sufficient importance to discuss it in his brief, and we do not consider it of sufficient moment to depart from the general rule that such assignments will not be considered." *Lee Tung v. United States* (9th C. C. A.), 7 Fed. (2d) 111, 112.

17-26). So apparent is this intent that it cannot well be gainsaid.

The strength or weakness, therefore, of counsel's assumption must rest in the answer to the question: Would Congress, had it known that its levy of processing taxes were to be held invalid, have provided, as in fact it did, that those persons who *paid* the processing tax should not be subjected to another levy upon the same commodity under a different Federal revenue statute? Government counsel, to suit their own purpose, blithely assume that it would not and they read into the provision words which are not there, namely, that the relief from the double tax was made dependent upon a *valid* collection of the processing tax. A moment's consideration shows that the very obvious intent of Congress would be doubly defeated if such contention be sound. The right to apply the particular method of computing the manufacturer's sales tax allowed by the proviso clause in Section 9 (a) was made dependent upon the *fact of payment* of the processing tax on the cotton contained in the subject article. If that levy has been paid (and no dispute exists here that it has been paid and has not been refunded; [see Finding IX, Tr. p. 144], then the article, said Congress in effect, should be freed from the additional tax on the weight of the same processed cotton under the other act. If this was the end sought to be achieved, what matters it that at some later date the courts have held the levy of the processing tax to be invalid? If it has been collected in fact and not refunded, the same discrimination and the same double taxation on the same commodity would be present whether the Agricultural Adjustment Act tax was validly or improperly collected.

Indeed, with the notable exception of the Government's attitude in the instant case, the administrative agencies of the United States have paid silent tribute to the very point we now urge. Although, other than by judicial knowledge, not a matter of record in this case because it is not susceptible of evidentiary proof, the Commissioner of Internal Revenue has made no effort, subsequent to *Butler v. United States*, so far as can be ascertained from the decisions and from the rulings and regulations of the Treasury Department, to assess additional manufacturer's excise taxes against those manufacturers who paid a processing tax on the weight of their cotton under the Agricultural Adjustment Act and took the benefit of the proviso clause of Section 9 (a). Clearly, if counsel's contentions be sound, the Commissioner has been remiss in his duties in not seeking to assess an additional manufacturer's excise tax upon the ground that the right to the credit taken was invalidated by the effect of the *Butler* decision and notwithstanding that another and larger levy upon the same commodity made under the Agricultural Adjustment Act was improperly collected and retained.

AN UNCONSTITUTIONAL STATUTE IS NOT A NULLITY
FROM THE BEGINNING AND FOR ALL PURPOSES.

The essence of counsel's whole argument upon this point rests upon what has come to be known as the "*ab initio*" theory of an unconstitutional law advanced by Mr. Justice Field in *Norton v. Shelby County*, 118 U. S. 425, 30 L. Ed. 178, 186, holding in effect that an unconstitutional law is no law, that it confers no rights and imposes no duties and is as inoperative as though it had never been passed. This doctrine of constitutional law, were it ever

such, has become, however, considerably outmoded as witness the language of Mr. Chief Justice Hughes in *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U. S. 371, 374; 84 L. Ed. 329, 332:

“It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. * * * Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.”

The same argument made by opposing counsel here was advanced by the taxpayer in *Anniston Mfg. Co. v. Davis, Collector*, before the Fifth Circuit Court of Appeals, 87 Fed. (2d) 773; affirmed later in 301 U. S. 337; 81 L. Ed. 1143. There the taxpayer sought to recover processing taxes from the Collector to whom they were paid, without proceeding in the manner required by Sections 902, *et seq.*, of the Revenue Act of 1936, which prescribed the procedure to be followed in seeking refunds of amounts collected under the Agricultural Adjustment Act. The taxpayer urged that under the doctrine of *Norton v. Shelby County*, the Collector had collected the taxes in question under an unconstitutional law that was in effect no law and that he was therefore a trespasser *ab initio*, without legal protection or authority [p. 779]. Adverting to the expression

of Mr. Justice Field in *Norton's* case quoted by appellee at Supplemental Brief page 3, the court stated at page 779:

“But, like every other like phrase coined arguendo in the process of decision, this phrase leaves something to be desired, when it is lifted from its argumentative setting to be converted into a general legal canon on, indeed, into almost a part of, the Constitution itself. When it is attempted, as here, to be given such wide application as not merely to strike down an exaction so that it cannot thereafter be collected, but to support a common-law action against a collector for moneys collected and paid into the Treasury by him under color of the law, and as a part of his official duties before the law was declared unconstitutional, it is well to call attention to exactly what was decided in that case, and to the fact that there is abundant authority to the contrary of the position appellants take.”

We invite the court's attention further to the very able discussion of the *Norton* case and to the subject of the effect of an unconstitutional statute contained on page 780 of that report.

J. A. Dougherty's Sons v. Commissioner of Internal Revenue (3rd C. C. A.), 121 Fed. (2d) 700, is pertinent. There the taxpayer, subject to a Pennsylvania floor tax on liquors, accrued certain sums on its books to pay the tax. Before payment was made the State Floor Tax was held unconstitutional and the taxes never were paid. The taxpayer contended that before the act was declared unconstitutional it was entitled to deduct the accrued taxes from gross income or, in the alternative, not being free to distribute the accruals to its stockholders it should be credited with these accruals against its liability for undis-

tributed profits tax. The Commissioner urged, as does counsel here, that the Pennsylvania Liquor Floor Tax having been declared unconstitutional was in effect never a law and removed the accruals from the category of "taxes accrued" as contemplated by the Revenue Acts. In reversing the Board of Tax Appeals, the court said at page 702:

"Although it was *formerly* held that an unconstitutional statute is a nullity *ab initio* (see *Norton v. Shelby County*, 118 U. S. 425, 442, 6 S. Ct. 1121, 30 L. Ed. 178, and *Chicago, Indianapolis & Louisville Railway Co. v. Hackett*, 228 U. S. 559, 566, 33 S. Ct. 581, 57 L. Ed. 966), *more lately* it has been recognized that the consequences of action taken or restricted in obedience to the requirements of a statute which subsequently is declared unconstitutional are to be appraised and adjudged in the light of the compulsion exerted by the statute prior to its determined invalidity."

and after quoting from the *Chicot County* case, *supra*, concluded:

"It is our opinion that, notwithstanding the later determined unconstitutionality of the Pennsylvania Floor Tax Act, the tax levies made pursuant thereto for the years 1935, 1936 and 1937 imposed upon the taxpayer a liability for each of the years in question which it was its duty to pay or accrue within the respective taxable years."

and

"* * * that the accruals for Pennsylvania floor taxes made by the taxpayer in the years 1935, 1936 and 1937 were proper when made and, as such, were deductible from gross income in the respective taxable years under Sec. 23 (c) of the Revenue Acts of 1934 and 1936."

In *Phipps v. School District* (3rd C. C. A.), 111 Fed. (2d) 393, plaintiff sought to enjoin a levy of local taxes because of the unconstitutionality of the statute under which they were levied. Seeking to avoid the effect of Section 24 (1) of the Judicial Code which forbids the Federal District Courts jurisdiction to enjoin collection of a tax imposed by state law plaintiff urged that the act being unconstitutional there never was, in fact, any law pursuant to which the subject taxes were sought to be levied. Said the court in affirming a judgment of dismissal, page 395:

“Accepting the unconstitutionality of the Act of 1929, as determined by the Supreme Court of the state, it was none the less the statute under which the school district acted when it levied its taxes for the years 1937 and 1938. * * * The determination of unconstitutionality did not make of the act a blank page in retrospect, as the appellants urge. Under it, actions had been taken by the school district, as the bill discloses, which were operative facts that must be recognized, at least, so far as the question whether the board acted by or pursuant to a law of the state is concerned.”

See, also:

Field, "The Effect of an Unconstitutional Statute,"
p. 91.

The right to deduct from the weight of tires sold the weight of the cotton therein on which a tax had been paid under the Agricultural Adjustment Act, as accorded by the proviso clause of Section 9 (a), was a right which accrued and vested in the taxpayer when it paid its

processing³ taxes, a right given by the Act and not expressly or impliedly struck down by the decision in the *Butler* case. The right accrued and was exercised [see Exhibit C, Tr. p. 197; Exhibits 1 and 2, Tr. pp. 236-238, and the Claims for Refund, Exhibits D and F, Tr. pp. 199 and 209] prior to the determination of the unconstitutionality of the tax-levying features of the Agricultural Adjustment Act (January 6, 1936) and under the authorities above cited and quoted the right to rely thereon was not struck down with the later adjudged invalidity of the taxing provisions of the statute.

That the decision in *United States v. Butler*, *supra*, had the effect of invalidating only those portions of the Agricultural Adjustment Act which sought to levy processing and so-called compensating taxes is evidenced by the opinion of this court in *Edwards v. United States*, 91 Fed. (2d) 767, 789, and by the enactment in 1937 of the Agricultural Marketing Agreement Act where, under Section 5 thereof, Congress expressly provided:

"No processing taxes or compensating taxes shall be levied or collected under sections 601 to 624 of this title, as amended. *Except as provided in the preceding sentence, nothing in this chapter shall be construed as affecting provisions of sections 601 to 624 of this title, as amended, * * *.*" (50 Stat. 249; 7 U. S. C. A. Sec. 673.)

The sections mentioned: "601 to 624 of this title," refer, of course, to the Agricultural Adjustment Act and include Section 9 (a) (§609 (a) of 7 U. S. C. A.) of which the proviso clause is a part.

³We use the term in the general sense as inclusive of the tax under Sec. 16. See Point III *infra*.

If, then, the expressed intention of Congress to grant relief from double taxation to and to avoid discrimination among those taxpayers who were subject to both processing taxes and excise taxes upon the same commodity is not to be ignored, effect must be given to the express mandate of the statute which in Section 14 thereof (7 U. S. C. A. Sec. 614) declares:

“If any provision of this chapter is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this chapter and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby.”⁴

and that portion of the statute which provided a specific method for the computation of manufacturer's excise taxes where the Agricultural Adjustment Act levy had been paid and collected must be preserved as Congress declared and must have intended it should be.

THE EQUITABLE PRINCIPLES INHERENT IN AN ACTION
FOR MONEY HAD AND RECEIVED GOVERN APPEL-
LANT'S RIGHT OF RECOVERY HEREIN.

The trial court concluded [Conclusion II, Tr. p. 154] that the right to the refund of this additional Manufacturer's Excise Tax which was “erroneously, illegally and unjustly demanded and collected” [Tr. p. 154] vested in the taxpayer under the equitable remedy of money had and received or, as stated by Mr. Chief Justice Hughes

⁴“When we are seeking to ascertain the congressional purpose, we must give heed to this explicit declaration.” Per Mr. Chief Justice Hughes in *Electric Bond & Share Company v. Securities and Exchange Comm.*, 303 U. S. 419, 434, 82 L. Ed. 936, 944.

in *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 350; 81 L. Ed. 1143, 1152:

“* * * the statutes providing for refunds proceed on the same equitable principles that underlie an action in assumpsit for money had and received. *That action ‘aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which ex aequo et bona belongs to the plaintiff.’*”

Examining, then, “the abstract justice of the case,” it is apparent that the Government has collected \$34,648.08 from the taxpayer as an invalid levy under the Agricultural Adjustment Act; through a misconstruction, as the trial court found, of the proviso clause of Section 9 (a)⁵ the Government further erroneously demanded and collected an additional excise tax of \$16,450.38 on the weight of the same processed cotton. Surely “the abstract justice of the case” will not permit appellee to assert the invalidity of one levy as a defense to a refund of the other. See *Bull v. United States*, 295 U. S. 247, 260; 79 L. Ed. 1421, 1427; *Stone v. White*, 301 U. S. 532, 534; 81 L. Ed. 1265, 1269.

If, in the words of Mr. Chief Justice Hughes, we look “solely to the inquiry, whether the defendant holds money which *ex aequo et bono* belongs to the plaintiff,” the Government’s improper collection of the Agricultural Adjustment Act tax will not be permitted to stand as a defense to it in refusing refund of another improper levy. Even as to the sovereign, two wrongs will not make a right.

⁵In holding that it had no application to taxes collected under Section 16 of the Agricultural Adjustment Act.

The injustice inherent in counsel's argument is well illustrated by the analogy of *Bull v. United States, supra*. It was there observed that the peculiar expediencies of government necessitated the reversal of ordinary processes of law in the collection of taxes; that it is only after the assessment and collection of the tax that the taxpayer can seek redress for unjust administrative action in the form of a proceeding for refund and restitution. "But", as Mr. Justice Roberts remarked, "these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign" (p. 260 of 295 U. S.; 79 L. Ed. at p. 1427). If, therefore, instead of the additional excise tax having been assessed and paid, the United States had had to maintain an action therefor, assuredly the taxpayer could have urged in defense thereof either that under the statute it was entitled to the deduction computation granted by the proviso clause of Section 9 (a) or, in the alternative, that it should be credited with the processing tax improperly collected from it under an unconstitutional statute. The same grounds it would then have had in defense of the action by the Government to collect the tax are available to it now in its action for refund. To paraphrase Mr. Justice Roberts' opinion:

"It is immaterial that * * * owing to the summary nature of the remedy, the taxpayer was required to pay the tax and afterwards seek refundment. This procedural requirement does not obliterate his substantial right to rely on his demand for credit of the amount which if the United States had sued him for excise tax he could have recouped against his liability on that score." (See p. 263 of 295 U. S.)

In short the true test of counsel's contention lies in the supposition that the Government instead of defending against the action for refund is here seeking to collect this additional excise tax upon the ground that the declared unconstitutionality of the taxing provisions of the A. A. A. carried with it the taxpayer's right to rely upon the exemption provisions contained in the proviso clause of Section 9 (a). Had such been the state of facts and had the court adhered to the now outmoded doctrine of Norton's case and had further held the proviso clause of Section 9 (a) not to be severable and had decided the issue in favor of the Government, certainly the taxpayer under the authority of *Bull v. United States*, *supra*, could have offset against the recovery the illegal exaction collected from it under the Agricultural Adjustment Act. Compare *United States v. MacDaniel*, 7 Pet. 1, 16-17, 8 L. Ed. 587, 592-593; *United States v. Ringgold*, 8 Pet. 150, 163-164; 8 L. Ed. 899, 904. Such being the case appellant should be placed in no worse a position because in the field of taxation the normal processes of law are reversed. If the Government could not have recovered in the one instance it cannot employ the same grounds to defeat recovery here.

APPELLANT HAS FOLLOWED THE PROPER AND THE ONLY
REMEDY FOR THE RECOVERY OF THIS ERRONEOUSLY
ASSESSED EXCISE TAX.

Counsel for the Government states that appellant has misconceived its remedy; that it should have sought recovery of the unconstitutional Agricultural Adjustment Act Taxes which the taxpayer paid in 1933, aggregating \$34,648.08 (Supplemental Brief p. 5). The objection begs the issue entirely. The additional tax recovery of which we are here seeking was admittedly assessed, de-

manded and paid as a Manufacturer's Excise Tax [Ex. C, Tr. p. 197; Conclusions II and IV, Tr. pp. 154-155]: it has been so treated by the Government throughout and as such could never have been recovered under the procedure prescribed for the recovery of Agricultural Adjustment Act taxes. Appellant therefore has pursued its sole remedy for the recovery of the tax in question and certainly it is not for the Government to complain that it has sought the recovery of an excise tax which it was erroneously compelled to pay rather than seeking the refund of another levy illegally made and collected under the Agricultural Adjustment Act.⁶

II.

The Record Adequately Shows That the Tax Was Neither Included in the Price of the Tires nor Collected From the Vendees.

It was urged at the time of oral argument that appellant had not met the burden of proof which Section 621 (d) of the Revenue Act of 1932 imposes as a condition to securing a refund because, although the record sufficiently showed that the additional tax was not included in the price of the tires sold, it was not in so many words testified that the taxpayer had not collected the amount of tax from the vendee.

We contend, however, that the testimony upon this point, which took the form of a stipulation as to what the witness George Hubbell would testify and which appears at pages 90 to 92 of the record is adequate to meet

⁶Of course, the time has now long since expired for appellant to file claim or prosecute an action for the refund of this tax. Secs. 903, 904, Int. Rev. Act of 1936; 7 U. S. C. A., Secs. 645, 646.

the requirements of the statute. This testimony, the court will recall, was found to be true and formed the basis of the trial court's Finding XXII [Tr. pp. 151-152]. In essence it was that the taxpayer, throughout the period from August 1, 1933 (the date when the cotton processing tax first went into effect) to April 10, 1934 (the date when the additional excise tax was first demanded) was *informed* and *believed* that for the purpose of computing its Manufacturer's Excise Tax it was entitled under the provisions of Section 9 (a) of the Agricultural Adjustment Act to deduct from the weight of tires sold the weight of the processed cotton contained therein on which a tax had been paid under either Section 9 (a) or Section 16 of the Agricultural Adjustment Act; that at no time during the period preceding April 10, 1934, did taxpayer or appellant *contemplate* that they, or either of them, would be called upon to pay an additional tax of $2\frac{1}{4}$ cents per pound on the weight of processed cotton on which a tax of approximately $4\frac{1}{2}$ cents per pound had already been paid under the Agricultural Adjustment Act; that taxpayer did not include in the price of the tires so sold by it any amount to cover any excise tax upon the processed cotton contained therein; that it sold said tires at the same price as those which contained cotton on which a processing tax under Section 9 (a) as opposed to the equivalent "inventory" tax under Section 16 had been paid;⁷ that it was not until long after

⁷Note that tires containing cotton on which a *processing* tax as such had been paid were clearly exempted by the proviso clause in question from the excise tax upon the weight of the same cotton. If, therefore, the tires here in question, containing cotton on hand on August 1, 1933, and upon which an inventory or floor tax under Section 16 had been paid, were sold at the same price, manifestly the additional excise tax subsequently demanded and paid thereon could not have been included and passed on to the purchasers.

the tires in question had been sold and billed that the additional tax was proposed, and that thereafter no additional amount was billed or collected from the purchasers of the tires [Tr. pp. 90-92].

Unless counsel for the Government can prevail upon the court to indulge two unwarranted assumptions, the foregoing testimony, uncontradicted and found by the trial court to be true, proves conclusively that this additional tax was neither included in the price of the tires sold nor collected from the purchasers thereof. To find otherwise, the court would have to assume, first, that the taxpayer passed on, separately and *as a tax*, to its vendees a levy which it was *informed* and *believed* it was not called upon to pay, which was, in fact, not *in contemplation* by it at the time, and, second, that if the additional tax was in fact separately billed and collected from the purchasers of the tires, that counsel for appellant and, indeed counsel for the Government,⁸ were guilty of unethical and, indeed, sharp practice in seeking to mislead the court by the use of subtle ambiguities and innuendo.

Cases cited by us in our Opening Brief (O. B. pp. 38-42), and to our knowledge there are none to the contrary, establish that the burden of proving that a particular tax has not been passed on must necessarily be sustained by proof that the liability for the particular tax was neither known nor in contemplation by the taxpayer when the taxable articles were sold by him.

⁸The testimony was the subject of a signed stipulation between the attorneys for both parties.

See:

Campana Corporation v. Harrison (7th C. C. A.),
114 Fed. (2d) 400 (O. B. pp. 38-39);

Skinner v. United States (D. C. Ohio), 8 Fed.
Supp. 999 (O. B. pp. 39-40);

Con-Rod Exchange, Inc. v. Hendricksen (D. C.
Wash.), 28 Fed. Supp. 924 (O. B. pp. 40-41);

Einson-Freeman Co. v. Corwin, Collector (D. C.
N. Y.), 29 Fed. Supp. 98 (O. B. p. 41);

University Distributing Co. v. United States (D.
C. Mass.), 22 Fed. Supp. 794 (O. B. p. 42).

As was observed in *United States v. Cheek* (6th C. C.
A.), 126 Fed. (2d) 1, 3:

"Where the evidence contradicts any real relationship between tax and price increases, that is, *indicates that the floor stock tax was never, in any sense, a factor in determining the sales prices of the various articles*, the burden of the statute has been adequately met. *Hutzler Bros. Co. v. United States*, D. C. Md., 33 F. Supp. 801; * * *."

In brief, we urge simply that the evidence was sufficient to satisfy the conditions precedent of Section 621 (d) because it established (a) that the tax was not included in the price of the tires sold and (b) by necessary hypothesis the amount of the additional tax could not have been collected from the taxpayer's vendees *as tax* because at the time the tires were sold the taxpayer, as found by the court [Tr. pp. 151-152] and established by the evidence [Tr. pp. 90-92], was *informed and believed* that it was not liable for the extra tax and did not have it in contemplation.

In fact for the taxpayer to have attempted to collect this additional excise tax from its vendees when it was informed and believed that no liability for the tax existed would have been a crime under the Revenue Laws of the United States⁹ and criminal guilt will never be presumed.

The only meaning, therefore, of which the stipulated evidence is susceptible is that neither appellant nor the taxpayer included the additional tax in the price of the articles with respect to which it was imposed and that they did not collect the amount thereof from the vendees.

Corroborative of the stipulated testimony of the witness George Hubbell was the verified Amended Claim for Refund of the taxpayer filed with the Collector at Los Angeles and received in evidence as appellant's Exhibit E. Therein it was stated under oath:

"The taxpayer did not include the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. *Neither did it collect the amount of said tax from the persons to whom the articles in question were sold.*"

[Tr. p. 206].

The same asseveration was made in the Amended Claim for Refund made by appellant. [Exhibit G, Tr. p. 217].

⁹Sec. 1132, Revenue Act of 1926; 26 U. S. C. A., Sec. 3325:

"Whoever in connection with the sale or lease, or offer for sale or lease, of any article, or for the purpose of making such sale or lease, makes any statement, written or oral, (1) intended or calculated to lead any person to believe that any part of the price at which such article is sold or leased, or offered for sale or lease, consists of a tax imposed under the authority of the United States, or (2) ascribing a particular part of such price to a tax imposed under the authority of the United States, knowing that such statement is false * * * shall be guilty of a misdemeanor * * *."

In his affidavit in support of appellant's motion to reopen, the witness George Hubbell further stated under oath that the original books and records of the taxpayer would corroborate in all respects the stipulated testimony of the affiant and

“from which it can be shown and will appear and upon the basis of which he can and will testify that the tax (the refund of which is sought in the above entitled action) *was not passed on* to the vendees of said corporation; * * *.” [Tr. p. 130].

III.

The Proviso Clause of Section 9(a) of the Agricultural Adjustment Act Had Application Alike to Taxes Levied Under Section 16 as Well as Taxes Levied Under Section 9(a).

Strictly, the only meritorious defense presented by the Government in its opposition to the refund of this additional manufacturer's sales tax is its contention that the proviso clause of Section 9 (a) by its terms purports to allow a deduction from the taxable weight of commodities containing cotton only where a *processing* tax has been paid thereon and that the unnamed levy made under Section 16 does not fall within the statutory definition of “processing tax.”

This point has been covered by us at pages 17 to 26 of Appellant's Reply Brief and little more need be said thereon other than that a reading of Sections 9 (a), 15 (e), 16 and 17 of Title I of the Agricultural Adjustment Act (7 U. S. C. A. §§ 609 (a), 615 (e), 616 and 617) con-

vincingly show that the various tax levies provided for were all of them identical in amount with, were measured by, and were effective simultaneously with the tax "upon the first domestic processing" as defined in Section 9 (a), and that in employing the term "processing tax" in the statute, Congress used the words generically as inclusive of all the levies made under the Act. Certainly to restrict the words "processing tax" in the proviso clause of Section 9 (a) as urged by Government counsel would contravene the very manifest intent sought to be achieved by Congress in the enactment of the proviso and would result in both unjust discrimination between manufacturers of the same class and impose double taxation upon the weight of the same processed cotton, an intent to do which will never be presumed. (*Maas v. Higgins*, 312 U. S. 443, 449, 85 L. Ed. 940, 945.)

But assume, *argumenti gratia*, that the literal use of the term "processing tax" is, in fact, so restricted by definition that it cannot be said to include the undefined, equivalent and counterpart levy made upon inventories on hand under Section 16 of the Agricultural Adjustment Act. The manifest purpose of the proviso clause is so apparent, the intent to relieve against double taxation upon the weight of the same processed cotton so clear, and the discrimination that would result from the inclusion of processing taxes and the exclusion of the identical tax on inventories so real that it becomes the duty of the court to construe the clause so as to give effect to the purpose of the statute, "*sacrificing, if necessary, the literal meaning*

in order that the purpose may not fail''' (*Ozawa v. United States*, 260 U. S. 178, 194, 67 L. Ed. 199, 207).

Compare *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 79 L. Ed. 211, wherein it was said that the fact that the word "obligations" had been given a particular and narrower construction in one part of the Internal Revenue Act of 1926 could not deter the court from giving it a broader and more general meaning in another part of the Act where the intent of Congress would be thereby subserved (p. 89):

"If, upon a consideration of the context and the objects sought to be attained and of the act as a whole, it adequately appears that the general words were not used in the restricted sense suggested by the rule, we must give effect to the conclusion afforded by the wider view in order that the will of the legislature shall not fail."

The *Anniston Manufacturing Company* case, cited by counsel at Supplemental Brief page 11, did not involve in any sense an interpretation of the proviso clause nor, indeed, of any portion of the Agricultural Adjustment Act, but concerned itself solely with the adequacies of the remedies for refund prescribed by Congress under Title VII of the Revenue Act of 1936. That a later Congress, after the Act had been declared unconstitutional provided somewhat different modes of procedure for the recovery of processing taxes and floor stocks taxes argues nothing for or against the meaning of the term "processing taxes" as employed by the 73rd Congress in the proviso clause of Section 9 (a) of the Agricultural Adjustment Act.

Conclusion.

Other points raised by Government counsel, either in oral argument or in their Supplemental Brief, have, we believe, been fully covered in Appellant's Opening and Reply Briefs, particularly the assertion of an alleged variance between the claims for refund and the grounds urged for recovery at the trial (see Reply Brief, Point III, pp. 12-16). As to the effect of the Government's stipulation for the filing of the amended complaint wherein the alleged "new grounds" of recovery were first presented, see *Snead, Collector v. Elmore* (5th C. C. A.), 59 Fed. (2d) 312 at 313.

The reference made in the footnote at page 5 of the Government's Supplemental Brief to Section 2074, Revised Code of Delaware, 1935, is fully answered by the following authorities:

Rev. Code of Delaware, Section 2075;

Arn v. Bradshaw Oil & Gas Co. (5th C. C. A.),
93 Fed. (2d) 728, 731;

Stearns Coal etc. Co. v. Van Winkle (6th C. C. A.), 221 Fed. 590, 596;

Gardiner v. Automatic Arms Co. (D. C. N. Y.),
275 Fed. 697, 701.

In conclusion, and at the risk of reiteration, we desire to present once again the question upon the answer to which this action is to be judged: "Does defendant hold moneys which *ex aquo et bono* belong to plaintiff?" The defendant has collected under protest of the taxpayer and

under compulsion of statute \$51,098.47, \$34,648.08 of which by admission of counsel was an illegal exaction under an unconstitutional statute and the balance of which, the subject of this action, was the result of an erroneous construction of the proviso clause of Section 9 (a). We earnestly believe that we have met and satisfied every condition and requirement for the refund of this tax. Has the Government shown good and sufficient cause why it should be permitted to retain the wrongful exaction? The answer to that question, we believe, necessitates a reversal of the judgment below.

Respectfully submitted,

F. C. LESLIE and

NEWLIN & ASHBURN,

Attorneys for Appellant.

F. C. LESLIE,

RAY J. COLEMAN,

HUDSON B. COX,

Of Counsel.

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

VS.

COLUMBIA NATIONAL BANK, a corporation,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States
Board of Tax Appeals

FILED

AUG 24 1932

PAUL H. COTTON

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

HENRY F. MOORE, C. P. A.

JOHN F. WATSON, Esq.,

THOMAS P. GOSE, Esq.;

For Commissioner:

E. M. WOOLF, Esq.,

ALVA C. BAIRD, Esq.

Docket No. 106404

COLUMBIA NATIONAL BANK,
DAYTON, WASHINGTON,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1941

Feb. 10—Petition received and filed. Taxpayer notified. Fee paid.

Feb. 10—Copy of petition served on General Counsel.

Mar. 12—Motion to dismiss (Rule 6) filed by General Counsel.

Mar. 14—Hearing set April 9, 1941 on motion.

Mar. 22—Motion for leave to file amended petition filed by taxpayer.

1941

- Apr. 4—Amended petition filed by taxpayer. 4 5 41 copy served.
- Apr. 9—Hearing had before Mr. Arundell on motion of respondent to dismiss. Amended petition objected to by respondent. Four weeks to file a further amended petition to include facts, etc.
- Apr. 9—Order that proceeding be continued to the Washington, D. C. calendar of 5/7/41 for further hearing upon respondent's motion to dismiss with leave to the petitioner to file within that time a second amended petition prepared in accordance with the Board's rules entered.
- Apr. 28—Second amended petition filed by taxpayer. 4 29 41 copy served.
- Apr. 28—Request for Circuit hearing in Seattle. Washington filed by taxpayer. 4 28 41 copy served.
- Apr. 28—Notice to serve further papers on John F. Watson filed by Henry F. Moore.
- May 6—Notice of the appearance of John F. Watson as counsel filed.
- May 7—Hearing had before Mr. Arundell on motion of respondent to dismiss. Denied (Second amended petition). Usual time to answer.
- May 7—Order that respondent's motion to dismiss be denied and respondent be allowed 60 days to answer or 45 days to move, entered.

1941

- Jun. 3—Answer to second amended petition filed by General Counsel.
- Jun. 5—Copy of answer to second amended petition served on taxpayer.
- Jul. 22—Hearing set Sept. 8, 1941 in Seattle, Washington.
- Aug. 20—Amended application for subpoena of the respondent filed by taxpayer.
- Aug. 20—Subpoena duces tecum to Guy T. Helvering issued.
- Sep. 9—Hearing had before Mr. Sternhagen on merits. Stipulation of facts filed. Appearance of Thomas P. Gose filed. Petitioner's brief due in 30 days—respondent 30 days for reply—petitioner 15 days for reply.
- Sep. 27—Transcript of hearing of 9/9/41 filed.
- Oct. 6—Brief filed by taxpayer. 10/6/41 copy served.
- Nov. 8—Brief filed by General Counsel. 11/10/41 copy served. Mimeograph copies received 11/27/41. (Copy served)
- Nov. 24—Reply brief filed by taxpayer. 11/24/41 copy served. [1*]

1942

- Jan. 29—Memorandum opinion rendered, Sternhagen. =10. Decision will be entered under Rule 50. 1/29/41 copy served.

*Page numbering appearing at top of page of original certified Transcript of Record.

1942

- Feb. 6—Computation of deficiency filed by taxpayer.
- Feb. 9—Hearing set March 11, 1942 on settlement.
- Feb. 9—Copy of recomputation and notice of hearing served on General Counsel.
- Feb. 24—Computation of deficiency filed by General Counsel.
- Feb. 26—Decision entered, Sternhagen, Div. 10.
- May 15—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit with assignments of error filed by General Counsel.
- May 23—Proofs of service filed by General Counsel. (4).
- Jun. 8—Statement of points filed by General Counsel with proof of service thereon.
- Jun. 8—Designation of parts of record to be included in record on review filed by General Counsel with proof of service thereon.
- Jun. 8—Agreed statement of evidence filed. [2]

United States Board of Tax Appeals
Docket No. 106404.

COLUMBIA NATIONAL BANK,
Dayton, Washington,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

SECOND AMENDED PETITION

The above-named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols IT:90D:JW), dated November 22, 1940, and as a basis of its proceeding alleges as follows:

1. The Petitioner is a corporation organized under The National Bank Act with its place of business at Dayton, Washington. The return for the period here involved was filed with the Collector for the District of Washington.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the Petitioner on November 22, 1940.

3. The taxes in controversy are income taxes for the calendar year 1939 and in the amount of \$1,921.92.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

(a) In determining the tax liability of the Petitioner for the year 1939, the Commissioner in error treats as taxable income an item representing the recovery of bad debts written off in prior years in the amount of \$11,568.39.

5. The facts upon which the Petitioner relies as the basis of this proceeding are as follows: [3]

(a) This Petitioner filed in the office of the Collector of Internal Revenue at Tacoma, Washington, a timely income tax return, form 1120, for the calendar year ended December 31, 1939, a net loss in the amount of \$920.36, being shown thereby.

(b) As a result of an examination of the said return for the year ended December 31, 1939, by an Internal Revenue Agent, per report dated May 16, 1940, this Petitioner was advised by the Internal Revenue Agent in Charge at Seattle, Washington, under date of October 15, 1940, (Reference, 2240-W) of a deficiency of \$1921.19, in income tax for the said year 1939.

(c) Under date of November 22, 1940, (Bureau Symbols IT:90D:JW) the Commissioner by Geo. C. Earley, Internal Revenue Agent in Charge at Seattle, Washington, advised this Petitioner that a determination of Petitioner's income tax liability for the taxable year ending December 31, 1939, disclosed a deficiency in income tax for the said year 1939 in the amount of \$1,921.92, and that Petitioner had 90 days

from the date of mailing of said letter within which to file a petition with the United States Board of Tax Appeals for a redetermination of said deficiency. Said 90 day letter, with Statement therein referred to, being hereto attached marked "Exhibit A" (pages 1, 2 and 3), and made a part of this paragraph as fully for all intents and purposes as if herein set forth verbatim, and within said time limit, Petitioner's original petition was filed with the United States Board of Tax Appeals in this proceeding.

(d) The alleged deficiency shown in said ninety-day letter is based upon the inclusion as taxable income for the taxable year 1939 of \$11,568.39 recovered during said year on bad debts charged off in prior years. Hereto attached Marked "Exhibit B", and by reference made a part of this paragraph as fully for all intents and purposes as if herein set forth verbatim, is an itemized list of said bad debts recovered during the taxable year 1939, showing fully the facts pertaining to each item. Petitioner in its income tax returns for each of the years for which said various items respectively were charged off reported same as deductions but had no tax benefit therefrom by reason of there being no taxable net income for that year, regardless of said deductions. Each of the several items shown on said Exhibit was by Petitioner in good faith determined to be worthless

and uncollectible during the year same was charged off as shown by said exhibit, and Petitioner alleges that none of said recoveries constitutes taxable income for the taxable year 1939 or any other [4] year, and that the Commissioner is in error in including any of said recoveries as taxable income for the taxable year 1939.

Wherefore, the Petitioner prays that this Board may hear the proceeding and redetermine the tax liability of this Petitioner on the basis of the elimination from income for the said year of the said bad debt recoveries in the amount of \$11,568.39.

(Signed) HENRY F. MOORE (C.P.A.)

Counsel for Petitioner,
809 Hoge Building,
Seattle, Washington.

(Signed) JOHN F. WATSON

Counsel for Petitioner,
218 First National Bank
Building,
Walla Walla, Washington.

(Duly verified.) [5]

EXHIBIT "A"

No. 2240-W

Page 1.

TREASURY DEPARTMENT

Internal Revenue Service

Seattle, Washington

November 22, 1940

Office of

Internal Revenue Agent in Charge

Seattle Division

350 Federal Office Building

IT:90D:JW

Columbia National Bank,

Dayton, Washington.

Sirs:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1939, discloses a deficiency of \$1,921.92 as shown in the statement attached.

In accordance with the provisions of existing Internal Revenue Laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Seattle,

Washington, for the attention of IT:90D:JW. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner.

By GEO. C. EARLEY,

Internal Revenue Agent in
Charge

Enclosures:

Statement.

Form of Waiver.

JW-ah [6]

STATEMENT

IT:90D:JW

Columbia National Bank,
Dayton, Washington.

Tax liability for the taxable year ended December 31, 1939.

	Liability	Assessed	Deficiency
Income Tax	\$1,921.92	None	\$1,921.92

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated May 16, 1940.

A copy of this letter and statement has been mailed to your representative, Henry F. Moore, 809 Hoge Building, Seattle, Washington, in accordance with the authority contained in the Power of Attorney executed by you and on file with the Bureau.

Adjustments to Net Income

Net loss as disclosed by return.....		(\$ 920.36)
Unallowable deductions and additional income:		
(a) Recovery of Bad Debts.....	\$11,568.39	
(b) Mark-down of Furniture and Fixtures	1,000.00	
(c) Interest on U. S. Bonds.....	1,943.29	14,511.68
Net income adjusted		<u>\$13,591.32</u>

EXPLANATION OF ADJUSTMENTS

(a) Recoveries on debts previously charged off your books as uncollectible were realized in the amount of \$11,568.39, but on your return this amount was treated as nontaxable income. It is held that the entire amount of such recoveries represented taxable income.

(b) There was deducted on your return \$1,000.00 that was explained under Schedule M as "Write off on Furniture & Fixtures (Examiner's Request), \$1000.00".

Since the cost of such assets is recoverable under allowances for depreciation, the extra charge-off is not allowable. [7]

(c) Interest on U. S. Bonds is subject to excess-profits tax, but since the credit exceeds the net income for excess-profits tax computation, this adjustment does not affect your total tax liability.

COMPUTATION OF TAX

EXCESS-PROFITS TAX

No excess-profits tax assessable or assessed:

Exemption, \$20,101.96.

INCOME TAX COMPUTATION

Tax on Special Classes of Corporations

Net income for excess-profits computation.....\$13,591.32

Less:

Excess-profits Tax none

Net income 13,591.32

Less:

Interest on obligations of the United States, etc... 1,943.29

Adjusted net income 11,648.03

Special class net income.....\$11,648.03

Corporations Not Subject to Graduated Income Tax Rates

National Bank

	Rate	
(Income tax assessable)....\$11,648.03	16½%	1,921.92

Income Tax Assessed:

Original, Account No. 850086 none

Deficiency of Income Tax..... \$1,921.92

EXHIBIT B

Bad Debt Recoveries by Columbia National Bank of Dayton, Washington,
During the Taxable Year 1939.

Name and Address of Debtor.	Amount of Debt Originally Charged off.	Year in Which Charged off and Reasons Therefor.	Amount Recovered, 1939
C. N. Seeley, Dayton, Washington.	\$1,000.00	1930—Determined to be worthless and uncollectible.	\$ 500.11
G. N. Gosney, Dayton, Washington.	3,000.00	1930— “ “	\$ 2,451.25
W. B. Ingram, Dayton, Washington.	4,500.00	1930— “ “	\$ 1,435.00
Joe Rose, Dayton, Washington.	2,000.00	1930— “ “	281.56
Remie, De Ruwe, Dayton, Washington	10,000.00	1930— “ “	3,001.28
Edna Chandler, Dayton, Washington.	4,600.00	1934— “ “	45.03
Fred McCauley, Dayton, Washington.	1,375.00	1934— “ “	100.00
Lindsey Magill, Dayton, Washington.	1,100.00	1934— “ “	100.00
Ray E. Gaines, Dayton, Washington.	2,200.00	1934— “ “	1,267.58
E. G. Harsh, Dayton, Washington.	260.00	1935— “ “	25.00
Hannah Fanscher, Spokane, Washington.	9,240.00	1936— “ “	496.52
B. N. Bessett, Dayton, Washington.	3,443.00	1936— “ “	791.06
Earl Winnett, Dayton, Washington.	35.00	1936— “ “	4.00
			[9]
Oren Jones, Dayton, Washington.	\$ 1,000.00	1937— “ “	\$ 1,000.00
Knud Paulsen, Dayton, Washington.	70.00	1937— “ “	70.00
Totals.....	\$43,823.00		\$11,568.39

[Endorsed]: U.S.B.T.A Filed Apr. 28, 1941. [10]

[Title of Board and Cause.]

ANSWER TO SECOND AMENDED PETITION

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the second amended petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the second amended petition.

2. Admits the allegations contained in paragraph 2 of the second amended petition.

3. Admits the allegations contained in paragraph 3 of the second amended petition.

4. Denies that he erred in his determination of the deficiency as shown by the notice of deficiency from which the petitioner's appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraph 4(a) of the second amended petition. [11]

5. (a), (b) and (c). Admits the allegations contained in subparagraphs (a), (b) and (c) of paragraph 5 of the second amended petition.

(d). Admits that the deficiency shown in said 90-day letter is based upon the inclusion as taxable income for the taxable year 1939 of \$11,568.39 recovered during said year on bad debts charged off in prior years. Denies the remaining allegations contained in subparagraph (d) of paragraph 5 of the second amended petition.

6. Denies generally and specifically each and

every material allegation contained in the second amended petition herein, not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination of deficiency be approved.

(Signed) J. P. WENCHEL

JHP

Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,
Division Counsel.

JOHN H. PIGG,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: U.S.B.T.A. Filed Jun. 3, 1941. [12]

[Title of Board and Cause.]

STIPULATION OF FACTS

It is hereby stipulated that for the purposes of this proceeding the United States Board of Tax Appeals may consider as true the following:

I.

The above named Petitioner, as shown by its fed-

eral income tax returns to be introduced in evidence herein, had net losses as follows:

For 1930 a net loss of.....	\$ 43,634.92
“ 1931 “ “ “ “.....	12,620.33
“ 1934 “ “ “ “.....	89,529.75
“ 1935 “ “ “ “.....	7,487.59
“ 1936 “ “ “ “.....	3,758.83
“ 1937 “ “ “ “.....	12,621.71
Total.....	<hr/> \$169,653.13

II.

In each of said years Petitioner charged off bad debts as follows:

In 1930 charged off.....	\$ 98,674.20
“ 1931 “ “.....	57,809.73
” 1934 “ “.....	91,394.63
“ 1935 “ “.....	17,968.90
“ 1936 “ “.....	26,889.70
“ 1937 “ “.....	31,705.87
Total.....	<hr/> \$324,443.03

[13]

III.

In 1939 Petitioner made recoveries upon said bad debts as follows:

Of bad debts charged off in 1930 recovered.....	\$ 7,699.20
“ “ “ “ “ “ 1934 “.....	1,512.61
“ “ “ “ “ “ 1935 “.....	25.00
“ “ “ “ “ “ 1936 “.....	1,291.58
“ “ “ “ “ “ 1937 “.....	1,070.00
Total.....	<hr/> \$11,568.39

IV.

The particular debts previously charged off by Petitioner, and upon which recoveries were made

in 1939, and the authority for such charge-offs are correctly set forth and shown in Schedule "A" hereto attached.

V.

Petitioner for each of the years from 1930 to 1939, inclusive, kept its books of account, made its Federal income tax returns and paid its income taxes, if any, on a cash basis, and not on an accrual basis.

VI.

It is agreed that the facts stipulated herein are for the purposes of this case only and are not to be binding on either party hereto in any controversy now pending or which may hereafter arise in respect to tax liability other than that involved in this proceeding.

Dated this 8th day of September, A. D., 1941.

JOHN F. WATSON

Of Counsel for Petitioner
218 First National Bank Bldg.
Walla Walla, Washington

(S) J. P. WENCHEL

Chief Counsel
Bureau of Internal Revenue

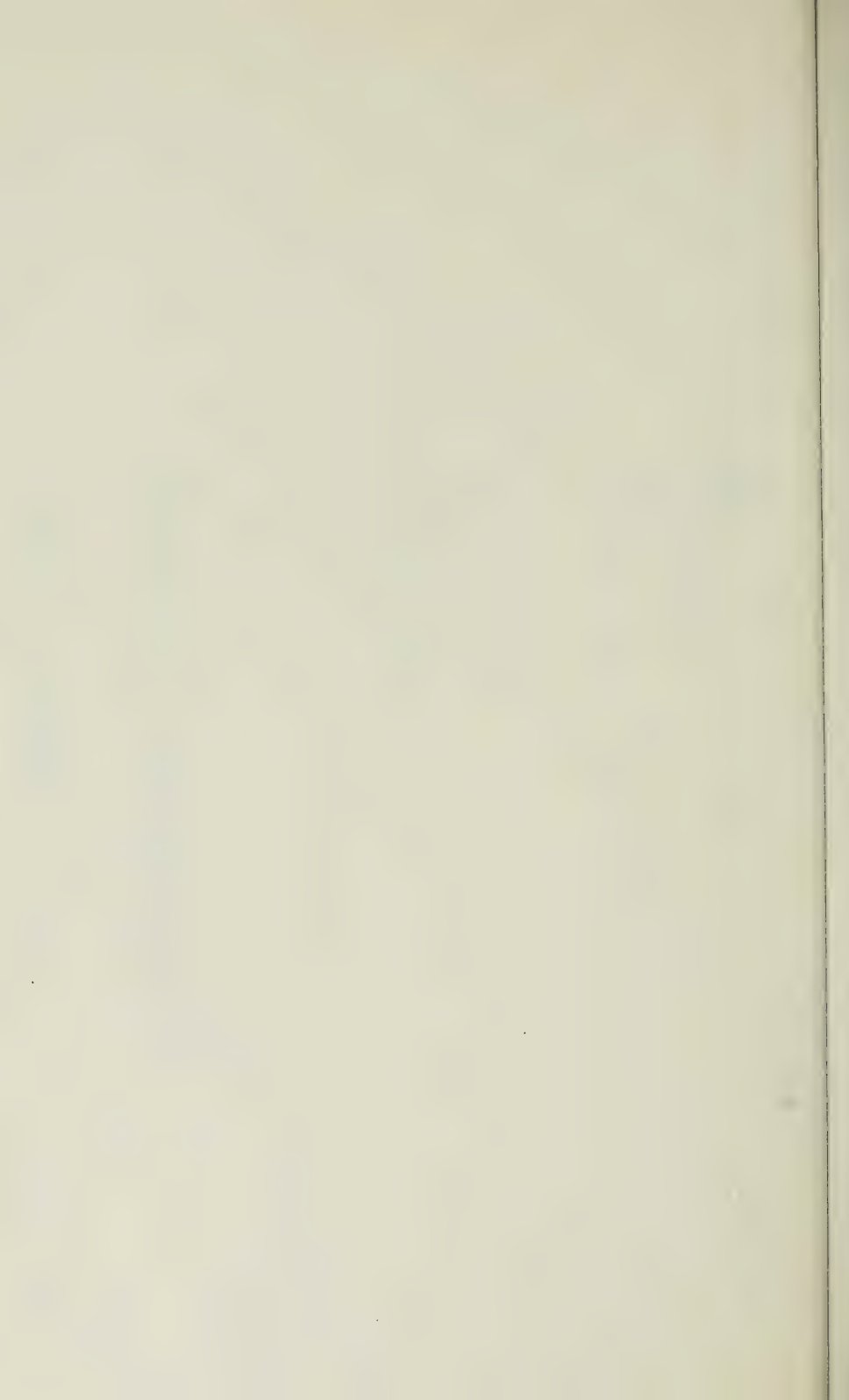
Name and Address of Debtor	Amount of Debt Originally Charged Off
C. N. Seely, Dayton, Wash.....	\$ 1,000.00
G. N. Gosney, Dayton, Wash.....	3,000.00
W. B. Ingram	{ 2,500.00
Dayton, Washington	{ 2,000.00
Joe, Rose, Dayton, Wash.....	2,000.00
Remie DeRuwe, Dayton, Wash.....	10,000.00
Edna Chandler, Dayton, Wash.....	4,600.00
Fred McCauley, Dayton, Wash.....	1,375.00
Lindsey Magill, Dayton, Wash.....	1,100.00
Ray E. Gaines, Dayton, Wash.....	2,200.00
E. G. Harsh, Dayton, Wash.....	260.00
Hannah Fanscher, Spokane, Wash.....	9,240.00
B. N. Bessett, Dayton, Wash.....	3,443.00
Earl Winnett, Dayton, Wash.....	35.00
Oren Jones, Dayton, Wash.....	1,000.00
Knud Paulsen, Dayton, Wash.....	70.00
Total.....	<u>\$43,823.00</u>

[Endorsed]: U.S.B.T.A. Sep. 9, 1941. [15]

SCHEDULE "A"
Columbia National Bank of Dayton, Washington
Docket No. 106,404

Year in Which Charged Off	Determined Uncollectible Within The Year of Charge-off by	Date of Examiner's Report
1930	National Bank Examiner	Oct. 2, 1930
1930	Do.	Oct. 2, 1930
1930	Comptroller of the Currency	
1930	National Bank Examiner	Oct. 2, 1930
1930	Do.	Oct. 2, 1930
1930	Do.	Oct. 2, 1930
1934	Do.	Feb. 6, 1934
1934	Do.	Do.
1934	Do.	Nov. 13, 1934
1934	Do.	Feb. 6, 1934
1935	Do.	Dec. 11, 1935
1936	Do.	Oct. 20, 1936
1936	Do.	Oct. 20, 1936
1936	Do.	Oct. 20, 1936
1937	Do.	Dec. 15, 1937
1937	Do.	Dec. 15, 1937

Date of Comptroller's Letter	Date Charge-off Authorized in Minutes	Amount Recovered in 1939
	Oct. 7, 1930	\$ 500.11
	Oct. 7, 1930	2,451.25
	Aug. 5, 1930	900.00
	Oct. 7, 1930	535.00
	Oct. 7, 1930	281.56
	Oct. 7, 1930	3,001.28
		45.03
		100.00
		100.00
		1,267.58
		25.00
		496.52
		791.06
		4.00
		1,000.00
		70.00
		<hr/>
		<u>\$11,568.39</u>



[Title of Board and Cause.]

MEMORANDUM OPINION.

Sternhagen:

The Commissioner determined a deficiency of \$1,921.92 in petitioner's income tax for 1939. He included in petitioner's income the amount of recoveries of debts which had in earlier years been charged off and deducted. The facts are stipulated, and they are so found. The question is the same as has been considered by the Board in earlier cases, and it needs no exposition.

In 1939, petitioner recovered \$11,568.39 of debts which had been charged off in 1930, 1934, 1935, 1936, and 1937. In the years when the debts were charged off, other debts had been charged off also. The total amount of debts charged off in each year was greater than the amount of net loss sustained in that year, including the charge-off for debts in the computation of net loss. The taxpayer regards the recoveries in 1939 as amounts of which it had not taken a deduction or otherwise received a "tax benefit" in the year of charge-off. For that reason it excluded the recoveries from its gross income. This is in accord with *Central Loan & Investment Co.*, 39 B.T.A. 981; *National Bank of Commerce of Seattle*, 40 B.T.A. 72, affirmed 115 Fed. (2d) 875; *American Dental Co.*, 44 B.T.A. 425, (on review C.C.A. 7); *Amsco-Wire Products Corporation*, 44 B.T.A. 720; *Hurd Millwork Corporation*, 44 B.T.A. 786, 791; *State-Planters Bank & Trust Co.*, 45 B.T.A.

630; and contrary to Stearns Coal & Lumber Co. v. Glenn, — Fed. Supp. — (D.C. Ky., Dec. 5, 1941).

The determination is reversed.

Decision will be entered under Rule 50.

[Seal]

Entered: January 29, 1942. [16]

United States Board of Tax Appeals
Washington

Docket No. 106404

COLUMBIA NATIONAL BANK,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Subsequent to the Board's Memorandum Opinion, entered January 29, 1942, the parties filed computations which agree as to the amount of the deficiency. In accordance therewith, it is

Ordered and Decided that there is a deficiency of \$13.14 in income tax for 1939.

Enter:

[Seal] (s) J. M. STERNHAGEN,
Member.

Entered Feb. 26, 1942. [17]

In the United States Circuit Court of Appeals
for the Ninth Circuit

B.T.A. Docket No. 106404

GUY T. HELVERING,

Commissioner of Internal Revenue,

Petitioner on Review,

v.

COLUMBIA NATIONAL BANK,

Respondent on Review.

PETITION FOR REVIEW AND
ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and John W. Smith, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

JURISDICTION

That the petitioner on review, hereinafter referred to as the Commissioner, is the duly appointed, qualified, and Acting Commissioner of Internal Revenue, holding his office by virtue of the laws of the United States; that the respondent on review, Co-

lumbia National Bank, hereinafter referred to as the taxpayer, is a corporation organized August 15, 1882, under the Banking laws of the United States, with its principal place of business at Dayton, Washington.

That the taxpayer executed and filed its corporation income and excess-profits tax return for the calendar year 1939 with the Collector [18] of Internal Revenue for the District of Washington, Tacoma, Washington, whose office is within the jurisdiction of this Honorable Court; that the Court in which the review of this cause is sought is the United States Circuit Court of Appeals for the Ninth Circuit.

The Commissioner files this petition for review pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

II.

NATURE OF CONTROVERSY

The nature of the controversy is as follows, to-wit:

During the calendar year 1939, taxpayer recovered \$11,568.39 on certain debts which it had charged off in 1930 and 1934 to 1937, inclusive, and taken deductions therefor in determining net taxable income for said years. The total amount of bad debt deductions was greater than the amount of the net loss sustained in said years.

The taxpayer, in its 1939 tax return, treated the amount of \$11,568.39 as nontaxable income.

On November 22, 1940, the Commissioner mailed

to the taxpayer a notice of deficiency in income tax for the year 1939 in the amount of \$1,921.92. In arriving at said deficiency the Commissioner increased the reported net income by three additions, the principal one being \$11,568.39 for recovery of bad debts, determining that such amount constituted taxable income for the year of recovery.

On February 10, 1941, the taxpayer filed a petition with the United States Board of Tax Appeals challenging the Commissioner's determination [19] set forth in his notice of deficiency. On April 4, 1941, taxpayer filed an amended petition and on April 28, 1941, filed its second amended petition. The taxpayer alleged in each petition that the Commissioner had erred in treating as taxable income the recoveries received in the year 1939, aggregating \$11,568.39. On June 3, 1941, the Commissioner filed his answer to the second amended petition.

The proceeding came on for hearing September 9, 1941, before a Division of the Board at Seattle, Washington. On January 29, 1942, the Board entered its memorandum opinion wherein it upheld the taxpayer's contention that it had not received a "tax benefit" in the year of charge-off and, therefore, the recoveries during the year 1939 of debts previously charged off, amounting to \$11,568.39, do not constitute taxable income for said year.

On February 26, 1942, the Board entered its decision wherein and whereby it ordered and decided that there is a deficiency of \$13.14 in income tax for 1939. The deficiency is due to other adjust-

ments made by Commissioner not contested by the taxpayer.

III.

ASSIGNMENTS OF ERROR

The Commissioner being aggrieved by the conclusions of law contained in the opinion of the United States Board of Tax Appeals and by its decision redetermining there is a deficiency of only \$13.14 in income tax for the calendar year 1939 desires to obtain a review by the United States Circuit Court of Appeals for the Ninth Circuit.

The Commissioner's assignments of error are as follow: [20]

The Board of Tax Appeals erred:

1. In holding and deciding that no part of \$11,568.39 recovered by the taxpayer in 1939 on account of bad debt losses claimed and allowed as deductions from gross income in determining income tax liabilities for prior years should be included in the taxpayer's gross income for such year.

2. In failing to hold and decide that the amount of \$11,568.39 recovered by the taxpayer in 1939 on account of bad debt losses claimed and allowed as deductions from gross income in determining income tax liabilities for prior years constituted taxable income for the calendar year 1939.

3. In entering its decision wherein it ordered and decided that there is a deficiency in income tax due from this taxpayer of only \$13.14 for the calendar year 1939.

4. In failing and refusing to enter its decision redetermining that there is a deficiency in income tax in the amount of \$1,921.92 for the calendar year 1939.

5. In that its decision is not supported by the evidence.

6. In that its decision is contrary to law and regulations.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, that a transcript of record be prepared in accordance with the rules of said Court and transmitted to the Clerk of said Court [21] for filing, and that proper action be taken to the end that the errors complained of may be reviewed by said Court.

(Sgd.) SAMUEL O. CLARK, JR.

Assistant Attorney General

(Signed) J. P. WENCHEL

RLW

Chief Counsel,

Bureau of Internal Revenue,

Counsel for Petitioner on

Review.

Of Counsel:

JOHN W. SMITH,

Special Attorney,

Bureau of Internal Revenue.

JWS:br 4-17-42

[Endorsed]: U.S.B.T.A. Filed May 15, 1942. [22]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To: Columbia National Bank,
Dayton, Washington.

You are hereby notified that the Commissioner of Internal Revenue did, on the 15th day of May, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-mentioned cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 15th day of May, 1942.

(Signed) J. P. WENCHEL,

RLW

Chief Counsel, Bureau of Internal Revenue, Counsel for
Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 19 day of May, 1942.

COLUMBIA NATIONAL BANK

By JNO. D. ANKENY.

[Endorsed]: U. S. B. T. A. May 23, 1942. [23]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To: John F. Watson, Esquire,
First National Bank Building,
Walla Walla, Washington.

You are hereby notified that the Commissioner of Internal Revenue did, on the 15th day of May, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 15th day of May, 1942.

(Signed) J. P. WENCHEL,

RLW

Chief Counsel, Bureau of Internal Revenue, Counsel for
Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 19th day of May, 1942.

JOHN F. WATSON.

Counsel for Respondent on
Review.

[Endorsed]: U. S. B. T. A. Filed May 23, 1942.

[24]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To: Thomas P. Gose, Esquire,
Henry F. Moore, C. P. A.,
809 Hoge Building,
Seattle, Washington.

You are hereby notified that the Commissioner of Internal Revenue did, on the 15th day of May, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 15th day of May, 1942.

(Signed) J. P. WENCHEL,

RLW

Chief Counsel, Bureau of Internal Revenue, Counsel for
Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 19 day of May, 1942.

THOMAS P. GOSE,

Counsel for Respondent on
Review.

[Endorsed]: U. S. B. T. A. Filed May 23, 1942.

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To: Thomas P. Gose, Esquire,
Henry F. Moore, C. P. A.,
809 Hoge Building,
Seattle, Washington.

You are hereby notified that the Commissioner of Internal Revenue did, on the 15th day of May, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 15th day of May, 1942.

(Signed) J. P. WENCHEL,

RLW

Chief Counsel, Bureau of Internal Revenue, Counsel for
Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 18th day of May, 1942.

HENRY F. MOORE,

Counsel for Respondent on
Review.

[Endorsed]: U. S. B. T. A. May 23, 1942. [26]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, the petitioner on review herein, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and hereby asserts the following errors on which he intends to rely in this review:

The Board of Tax Appeals erred:

1. In holding and deciding that no part of \$11,568.39 recovered by the taxpayer in 1939 on account of bad debt losses claimed and allowed as deductions from gross income in determining income tax liabilities for prior years should be included in the taxpayer's gross income for such year.

2. In failing to hold and decide that the amount of \$11,568.39 recovered by the taxpayer in 1939 on account of bad debt losses claimed and allowed as deductions from gross income in determining income tax liabilities for prior years constituted taxable income for the calendar year 1939.

3. In entering its decision wherein it ordered and decided that there is a deficiency in income tax due from this taxpayer of only \$13.14 for the calendar year 1939. [27]

4. In failing and refusing to enter its decision redetermining that there is a deficiency in income tax in the amount of \$1,921.92 for the calendar year 1939.

5. In that its decision is not supported by the evidence.

6. In that its decision is contrary to law and regulations.

(Signed) J. P. WENCHEL,

RLW

Chief Counsel, Bureau of Internal Revenue, Counsel for
Petitioner on Review.

Service of a copy of the within statement of points is hereby admitted this 25th day of May, 1942.

JOHN F. WATSON,

THOMAS P. GOSE,

Counsel for Respondent on
Review.

[Endorsed]: U. S. B. T. A. Filed Jun 8, 1942.

[28]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF EVIDENCE

The above-entitled proceeding came on for hearing on September 9, 1941, before the Honorable John M. Sternhagen, Member of the United States Board of Tax Appeals. The petitioner appeared by its counsel, John F. Watson, Esquire, Thomas P. Gose, Esquire, and Henry F. Moore, C. P. A., and the respondent appeared by his counsel, Alva C. Baird, Esquire.

The proceeding was heard on stipulation of facts, oral testimony and documentary evidence. All of the oral testimony introduced which is material and necessary for the determination of the assignments of error set out by the petitioner on review in his petition for review by this Court of the decision of the Board of Tax Appeals is set out herein in narrative form.

STATEMENT OF CASE ON BEHALF OF PETITIONER

Mr. Watson:

The petitioner seeks a redetermination of his income tax liability for the year 1939. The Commissioner claims a deficiency of \$1,921.92 for that year, based upon his including as taxable income \$11,568.39, bad debt recoveries during the year and which had been charged off in prior years. [29]

The respondent and petitioner have stipulated the facts as to the several charge-off years relative to the total charge-off and net loss of each year and particularly to various items covered in 1939 which the Commissioner seeks to tax.

It is also stipulated that during all of the years involved, the petitioner kept its books and accounts, made its Federal Income Tax Returns and paid its Federal Income Taxes on a cash basis, and not on an accrual basis. Consequently, our proof will be short and directed to two issues: The issue as to whether or not the petitioner had a tax benefit in a charge-off year on the recovery, which the Com-

missioner seeks to tax. The other issue would be the question as to whether the recovery which the Commissioner seeks to tax was a capital recovery. In other words, that the charge-off was out of the capital assets of the bank, and that when recovered, it would be a capital recovery.

STATEMENT OF CASE ON BEHALF OF RESPONDENT

Mr. Baird:

This taxpayer, during the years 1930 on to 1936 or 1937, according to its tax returns sustained losses. On those returns there were charged off the amounts which appear in the stipulation. We have not stipulated that the company sustained net losses because we don't know, but we have a stipulation as to what the returns will show. I assume Mr. Watson will supply testimony here to supply that link in the chain under his theory of the case.

We have stipulated as to what the recoveries were in 1939. It is simply a case of the bank having sustained losses in the prior years, [30] having charged off bad debts in those prior years and having received no tax benefits in those years.

Mr. Watson: We offer in evidence the income tax returns of the petitioner for the years 1930 to 1939, inclusive.

Mr. Baird: No objection.

The Court: Do you want those in as one exhibit?

Mr. Watson: Yes, your Honor.

The Court: Very well; Exhibit No.

(The documents referred to, Returns from 1930 to 1939, inclusive, were marked as Petitioner's Exhibit 1 and received in evidence.)

Mr. Baird: May an order be entered that we may withdraw these and substitute photostatic copies for these?

The Court: That may be done.

EVIDENCE ON BEHALF OF PETITIONER

GEORGE JACKSON,

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Watson:

My name is George W. Jackson. I was connected with the Columbia National Bank during the years 1930 to 1939. Up to 1935 I was vice president and director and from that time on I have been a director. I had supervision of keeping of the accounts from 1930 up to 1935, inclusive. I signed the income tax returns for the years 1930 to 1935, inclusive. I think I prepared the returns myself. The data for the returns were taken from the original records of the bank. The 1930 return included a charge-off of \$98,674.20. [31]

Q. What were those charge-offs? What constituted the items of them?

A. They were notes charged off at the request of the National Bank Examiner.

(Testimony of George Jackson.)

Q. For what reason?

A. He said that they were not admissible as an asset for a national bank.

Q. Were they no good, or were they——

A. They were a loss. In the view of the National Banking Department, they were no good.

Q. What I am getting at, Mr. Jackson, is whether or not they were charged off as being improper loans, or whether they were worthless loans.

A. Worthless at the time.

Q. In other words, all of those charge-offs were regarded as worthless? A. That is right.

Q. What were those loans made from?

A. They were made from the bank's funds.

Q. What happened when the loans were charged off? Did that impair the capital structure of the bank?

A. Yes, certainly. That is true of all these items.

Q. Is that true of the charge-offs shown in the returns for the ensuing years? A. Yes sir.

Q. And they represent the same kind of loans? [32] A. That is right.

Q. When I say "ensuing years," I mean not only the year 1930, but all of the years down to 1939.

A. That is right.

Q. I will ask you whether or not the petitioner bank had any tax benefits from the charge-offs of 1930 in that year. Is that shown by the return?

A. In 1930?

Q. Yes.

(Testimony of George Jackson.)

A. Well, they recovered \$13,289.10 that year.

Q. No. What I am getting at, Mr. Jackson, is this: What do those returns show, a net loss or a profit? Did you pay a tax that year?

A. No. We had losses of \$43,634.92 that year; that was the year's operation losses.

Q. These various loans that you have referred to as constituting the charge-off items, I will ask you whether or not they were made by the bank in the ordinary course of business. A. They were.

Cross-Examination

Mr. Baird:

Q. Mr. Jackson, what do you mean by your statement that the loans impaired the capital of the bank?

A. Any time we have a loss, it has to be charged somewhere to the capital structure.

Q. As a matter of fact, these loans were made in the usual course of business of the bank, were they not? [33] A. That is right.

Q. And made out of the funds that had been placed on deposit in the bank by depositors of the bank; isn't that right?

A. And stockholders.

Q. Well, deposits made by stockholders?

A. To the stockholders first, when we started the bank.

Q. Have you any further explanation as to that?

A. I don't know just what you mean.

Q. Well, I want the record to be clear that you are not attaching some peculiar significance to this

(Testimony of George Jackson.)

statement "paid out of capital." I am just trying to ascertain if there was something unusual about your transactions? A. No, there was not.

Q. These were loans made in the ordinary course of business of the banking business?

A. That is right.

Q. And made from amounts that were received by the bank from its depositors, stockholders, and others? A. Yes.

Mr. Baird: I think that is all.

The Court: Well, I don't think that is an answer to your question, made from "depositors, stockholders, and others." Do you mean they were made from the deposits on hand, irrespective of whether those deposits were made by stockholders or by others than stockholders? [34]

The Witness: The loans were made from the bank funds. The bank funds were an accumulation of capital stock and the depositors' money.

The Court: But none of these loans were earmarked as the source of the bank's funds from which the loans were made, were they?

The Witness: No.

The Court: You can't tell anything more about the source of the funds than appears on the ordinary financial statement of the corporation, can you?

The Witness: That is right.

The Court: If the corporation had deposits on hand sufficient for the loan, they made the loan, did they?

(Testimony of George Jackson.)

The Witness: That is right.

The Court: And did they make the loan as a customary matter? Did they make the loan even though they didn't have sufficient deposits on hand?

The Witness: No.

Redirect Examination

Mr. Watson:

Q. When these charge-offs were made what, if anything, was required by the Treasury Department, the Comptroller's Office, of your bank with reference to your capital structure?

A. When an examination was made, the Examiner would go through the loans, and when he would get through, he would hand me a little slip with the necessary amount of charge-offs to be made, and that was set up in a statement which went to the Comptroller of the Currency, and the next time he came back, if they were not charged off—well, I don't know what would [35] happen then, because they were always charged off.

Q. In other words, you would follow directions?

A. I would follow directions, yes.

Q. Was it necessary, because of these charge-offs, for the bank to call upon its stockholders or anyone else to repair the capital?

A. Yes. I think it was in 1933 we levied a voluntary assessment.

Q. To repair the impairment?

A. The capital stock was impaired.

Q. It was impaired?

(Testimony of George Jackson.)

A. By these notes that were charged off.

Q. The charge-offs impaired the capital?

A. Yes.

Recross-Examination

Mr. Baird:

Q. It was also impaired by other reasons, was it not? That wasn't the only reason, was it? Wasn't there something else?

A. The losses were the only things that impaired it.

Q. Those were the only things?

A. Yes.

The Court: Were the losses that were directly attributable to the charge-off of loans, the only things that impaired your capital in 1933?

The Witness: Yes.

The Court: If you had not charged off the loans in 1933 which had been required by the Comptroller of the Currency's office, do I understand you to say that what you call your capital, would not have been impaired [36] and you would not have been required to levy an assessment upon the stockholders to make good the impaired capital?

A. That is right.

Mr. Baird: Mr. Watson, it will be stipulated, I believe, that there were no charge-offs made in 1933 with which we are concerned in this case. Under the stipulation there were no recoveries made of those debts, is that right?

(Testimony of George Jackson.)

Mr. Watson: Yes, that is correct. The stipulation will be that there were no charge-offs in 1933, included.

Mr. Baird:

Q. Mr. Jackson, with reference to the amounts which were charged off, did you have some loans that were charged off by the bank examiner because of the fact that the loans were improperly made under the banking regulations; that is, loans made to officers or loans made to people that the Bank Examiner would not authorize?

A. No, sir.

Q. In other words, are we to understand from your testimony that in each instance that the charge-off was made, it was made solely because of the loan that had been ascertained to have been worthless; is that correct?

A. That is right.

Q. And in no instance was there a charge-off then, as I understand it, simply because the loan did not conform to the banking regulations?

A. No other reason than it was a loss. [37]

By Mr. Watson:

Q. Mr. Jackson, is it not a fact that during these years that at some time the bank had to reduce its capital stock because of the charge-offs?

A. Yes.

Q. How much was that reduction?

A. \$50,000.

GLENN JACKSON,

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Watson:

My name is Glenn Jackson. I have been cashier of the Columbia National Bank since January 1936. I succeeded Mr. George Jackson in the management of the bank. There was a cashier by the name of Bancroft ahead of me. As cashier, I have the supervision of the accounting and keeping of the books of the bank.

Q. Now, with reference to the charge-offs during the years you have been there, why were those charge-offs made?

A. By order of the National Bank Examiner.

* * *

Q. I show you petitioner's income tax return for the year 1939, and I will ask you what were the total recoveries on these bad debts during that year.

Mr. Baird: Well, if your Honor please, the return itself has been stipulated to. [38]

Mr. Watson: I just don't want any confusion to arise. If the Court please, the return shows recoveries of some \$21,000; but the \$11,568.39 represents that portion of the recoveries that were claimed to be nontaxable. I didn't want the Court to get the idea, and I didn't want the record to be confused, that this does not represent all the recoveries of 1939, but only a part of them, the part we

(Testimony of Glenn Jackson.)

claim was nontaxable. I think we can clear that up by this witness.

By Mr. Watson:

Q. You testified as to the total recoveries for that year?

A. Yes, it was \$10,559.69.

Q. That is your total recoveries for that year?

A. That is what it shows here.

Q. I call your attention to the bad debt schedule attached to that return and ask you what that shows.

A. Just the bad debts that were charged off in that year.

Q. Well, is there anything about that return which shows any recoveries claimed as nontaxable? Look in the reconciliation on that.

A. Recoveries not taxable, \$11,568.39.

Q. Now, is that in addition to the recoveries on bad debts shown on the first page of the return?

A. Yes.

Q. Then, as a matter of fact, the bad debt recoveries for that year totaled the sum of those two?

A. That is right. [39]

Q. Now, with reference to the bad debt recoveries that you include as income, I will ask you why you included those as being taxable and why you didn't include the others?

A. Well, the ones that are shown as not taxable are those from which we received no benefit when they were charged off, and the ones that are taxable, we had.

(Testimony of Glenn Jackson.)

Q. Do you mean that the \$10,000 which you show on your 1939 return as being recoveries of bad debts which you include in your income for 1939 are the recoveries of debts which you had not only charged off, but deducted in prior years; is that right?

A. Yes.

The Court: And that the deductions of those debts in prior years served to reduce your tax?

The Witness: Yes.

The Court: What do you mean by tax benefit. Am I to understand that in regard to the \$11,000 which you did not include in your gross income for 1939, although you did recover that, that your failure to include them was due to the fact that, first, you say you did not receive any tax benefit in prior years?

The Witness: That is right.

The Court: Now, I ask you what you meant by the statement that you did not receive any tax benefit in prior years with regard to the \$11,000.

The Witness: That was due to the amount of the notes that were charged off in those years. [40]

The Court: Well, explain now just as fully as you can, what you mean when you say you didn't receive any tax benefit in prior years?

The Witness: Well, our losses exceeded our income by such an amount that we received no benefits from having made those charge-offs.

The Court: That is what you mean, is it.

The Witness: Yes.

(Testimony of Glenn Jackson.)

Cross-Examination

By Mr. Baird:

Q. Mr. Jackson, with reference to the years in which the charge-offs were made, would you have sustained a net loss, even if you had not made any charge-off on these particular debts?

A. Well, I don't know.

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EMMETT MALLAGHAN,

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Watson:

My name is Emmett Mallaghan. I am engaged in the banking business. I am director of the Columbia National Bank of Dayton. I am also vice president and director of the First National Bank of Walla Walla, Washington. I know something about accounting, but to what extent, I would not say. I know how books are kept and how to check books. I prepared the return for the Columbia National Bank for 1939.

Q. I will ask you whether or not you have examined the original records of the bank and made any summary of the charge-offs and recoveries during these several years that are involved here. [41]

(Testimony of Emmett Mallaghan.)

A. I have.

Q. Is this it? (Counsel handed a paper to the witness.)

A. Yes. This is the summary of the charge-offs for each year, including 1930 to 1938, inclusive, and the recoveries made in those particular years.

Mr. Watson: I would like to offer this in evidence and I will give counsel a copy.

* * * * *

By Mr. Watson:

Q. Referring to petitioner's income return for the year 1939, I call your attention to the fact that it reports as taxable income bad debt recoveries of \$10,559.69, and as nontaxable bad debt recoveries of eleven thousand and something—I don't know what those figures are there exactly. Will you explain those two figures?

A. Well, on the face of the return that shows the recoveries on bad debts of \$10,559.69, which were included in gross income. Now, my reason for including that amount for the aggregate of recoveries on notes which had been charged off in years when we had a tax to pay. We weren't questioning that, but through our summary, we have recovered in the year 1939, \$11,568.39. These items were charged off in years when we had shown a loss, the years '30 to '36, I think, inclusive. I do not recall that, but, at any rate, there were running, five or

(Testimony of Emmett Mallaghan.)

six years, in which we showed a loss due to charge-offs.

Q. So that the total bad debt recoveries in that year would be made up of both sums? [42]

A. Yes, twenty some odd thousand dollars, which were reported for tax purposes, and the ten thousand dollars, but excluded and carried over into the reconciliation section to balance our capital structure account, reporting that we had made these recoveries, but that our contention was they were not taxable, under the ruling that was in effect at that time.

Q. And these recoveries went where?

A. The recoveries went into the profit and loss account of the bank, which is a part of the capital structure, the idea being to restore for the past impairment of the capital structure.

The Court: What do you mean by capital structure?

The Witness: The capital structure of this bank is the subscribed capital contributed by the stockholders—the contributed surplus by the stockholders, and the earnings in previous years which, if distributed, would go to the stockholders. Our profit and loss cares for the particular year in which we are operating, the loss of anything charged against the undivided profits, and the gain, if any, added to the undivided profits, and being left by the stockholders in the bank with the bank as additional capital.

(Testimony of Emmett Mallaghan.)

The Court: But in speaking of the bank's capital, you are not confining that to capital stock and paid in surplus, are you?

The Witness: No, I am including the undivided profits.

The Court: Coming out of the surplus for prior years, or earnings for prior years?

The Witness: Being built by the earnings of prior years being left by the stockholders, instead of being withdrawn as dividends. [43]

Cross-Examination

By Mr. Baird:

Q. With reference to the debts making up the item of eleven thousand some odd hundred dollars, would you have sustained net losses in the years 1930 down to 1936, if those debts had not been charged off?

A. Had those particular debts been charged off, which makes up the aggregate of \$11,000, would not have kept the bank from paying taxes; but we charged off as capital in 1930, \$98,000, and showed a loss of some forty some thousand dollars. That, on its face, shows for the particular period in which we were operating, the year 1930, we made a profit from the operation of the bank; but through the charge-offs, we took a loss to the extent of \$43,000. We are not claiming that we didn't have benefits of the entire \$98,000; but we are claiming that we had benefits of only \$43,000, and that was reduced \$43,-

(Testimony of Emmett Mallaghan.)

000 through the actual operating earnings of the bank in that year.

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EMMETT MALLAGHAN

was recalled as a witness by and on behalf of the petitioner and having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Watson:

Q. I will ask you with reference to this document that has been offered in evidence, and which is still being offered, whether you have included in this summary, the taxable recoveries reported as such in the 1939 return.

A. The taxable recoveries?

Q. The taxable recoveries reported. [44]

A. As to nontaxable?

Q. You have only covered the nontaxable.

The Court: That is \$11,000.

The Witness: That is \$11,000, the idea being that any part of it brought up through 1938 was to give the effect that part of the loss had been recovered, leaving the balance remaining upon which there had been no tax benefits; and I have just referred to the items that we were claiming as the \$11,000.

Cross-Examination

By Mr. Baird:

Q. You have prepared a schedule under the heading of "Recoveries and Application thereof to the year of write-off" and then, in the third column

(Testimony of Emmett Mallaghan.)

from the left next to the last subdivision, you have a subheading "Total Recoveries by Year." I notice for the year 1939 you say the total recovery was \$11,568.39.

A. The total recovery was some \$20,000.

Q. That is the point I am making. You have a heading here showing total recoveries, and that, obviously, is not correct.

A. That could be an error, but——

Q. It is an error, isn't it?

A. But as far as I am concerned, my thought in the matter is that it is immaterial, because we are not claiming the \$9,000. We are trying to arrive at 1931, 1932, 1933, 1934, we have charge-offs, and due to those charge-offs, we had substantial losses. Now, we are trying to put before you the amount of the recoveries from the year 1931 on down to 1938, which [45] applies against the losses of those particular years. We admit on the face of our income tax return that \$9,000 of that is taxable income. Why try to drag that into the schedule? We are figuring out years in which losses occur. We are not figuring out years in which we deducted our losses and then afterward paid taxes. I can see your point, as far as——

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Q. I assume that when you prepare a schedule and give certain headings and make certain state-

(Testimony of Emmett Mallaghan.)

ments, that the language used means what it says.

A. Exactly.

Q. And when you say that the recoveries for these years are certain amounts, I assume that that is correct; and we know from the evidence that it is not correct. This schedule must be qualified in some way, or it is going to be confusing to the Board; it will not mean anything to anyone.

Mr. Watson: I think the testimony of the witness has qualified it so far as 1939 recoveries are concerned.

Mr. Baird: It may be that that will be sufficient.

Redirect Examination

By Mr. Watson:

Q. I will ask you, then as to whether the total recoveries of other years than 1939, as shown on this proposed exhibit, include the total recoveries, or only the part of the recovery which the petitioner claims to be nontaxable.

A. Just the nontaxable. The facts are that prior to 1930, we had always paid income tax on those collections, and those collections and charge-offs prior to 1930 are all taxable.

Mr. Baird: Referring to the claim which, for the purpose of identification, [46] I will mark double X in a circle so that we can tell what we are talking about, I will ask if the amounts written there under "Total Recoveries," contain recoveries other than those from which you maintain you had no tax benefit?

A. Yes.

Mr. Baird: They are limited solely to those re-

(Testimony of Emmett Mallaghan.)

coveries from which you gain no tax benefit?

Mr. Watson: In other words, the only year in which you don't include the taxable recoveries is the year 1939?

The Witness: Correct.

Mr. Watson: But as to all other years, you include both taxable and nontaxable recoveries?

The Witness: Yes, and the taxable all refers either to the year 1933, in which we filed an amended return and paid tax, or to years prior to 1930.

The Court: Now, as to every year, as I understand the last testimony, the exhibits shows, and from its face, it appears to show, that for every year except 1939, the items called "Recoveries," is the full item of bad debt recoveries, irrespective of what was done with those bad debts on the income tax return, isn't it?

The Witness: Yes.

The Court: But as to the year 1939, the item shown on the paper, although it is called "Total Recoveries," is not in fact total recoveries, but is only the recoveries which were or were not shown as income on the income tax return, which?

The Witness: It was the ones that were shown as not taxable on the income tax return. [47]

The Court: Now, am I correct in my understanding, then, that with the exception of the characterization of the amount of total recoveries in 1939, the exhibit is exactly in accordance with the books?

(Testimony of Emmett Mallaghan.)

The Witness: It is exactly in accordance with the books as I get the figures.

The Court: What do you mean by "as you get the figures"?

The Witness: I meant as taken from the——

The Court: And every other year except 1939, the words "Total Recoveries" used on the paper is in fact, total recoveries, isn't it, without regard as to whether they are identified as prior so-called tax benefits or charge-offs or not; is that right?

The Witness: Yes, that is correct.

The Court: And it is only with respect to 1939 that the words, "Total Recoveries" is not accurate; is that right?

The Witness: Yes, that is right.

The Court: Is the record clear now?

Mr. Baird: I think so, your Honor. I think it may be admitted, but I would like to make this reservation: That we are conceding that it may be admitted only for the purpose of this case. In other words, we made no audit of the books, and we don't want to be bound here by some other taxable years as to something that may be included by that schedule.

The Court: I can safely say that you will not be bound by some other taxable year. The exhibit is admitted.

(The document referred to, Summary Sheet, was marked as Petitioner's Exhibit No. 2 and received in evidence.) [48]

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The Court: You do not reserve any right that counsel be bound by any other taxable year, do you, Mr. Watson?

Mr. Watson: If the Court would permit it, I would not object; but I think it would be asking too much.

The Court: I think the record shows the circumstances under which the respondent is now refraining from objecting to this exhibit.

Mr. Watson: Yes.

The Court: And I think in that stage of the record, and this being a public record, there is no chance of there being any doubt as to whether the petitioner will attempt to hold the respondent as to the accuracy as to something that may show up in another case. Now, have you any further evidence, Mr. Watson?

Mr. Watson: No, your Honor.

The Court: The exhibit is received.

* * * * *

The foregoing was all of the material testimony offered on behalf of petitioner in this cause. Thereupon, counsel for petitioner and counsel for respondent stated that they had no further evidence to present and submitted the cause to the Member of the Board of Tax Appeals hearing the proceedings.

The foregoing is the substance of all the evidence adduced at the trial of said proceeding and the Commissioner of Internal Revenue tenders and presents the foregoing as a statement of the evidence in the cause and prays that the same be approved

by the United States Board of Tax Appeals and made a part of the record in this cause.

(Signed) J. P. WENCHEL,

RLW

Chief Counsel, Bureau of Internal Revenue. [49]

The above and foregoing statement of evidence contains the substance of all the evidence material for a review of the rulings and decision assigned as error herein and the same may be approved by the Board without notice.

JOHN F. WATSON,

THOMAS P. GOSE,

Counsel for Respondent on Review.

[Endorsed]: U. S. B. T. A. Jun. 8, 1942. [50]

[Title of Board and Cause.]

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD**

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 159, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeipie in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax

Appeals, at Washington, in the District of Columbia, this 12th day of June, 1942.

[Seal]

B. D. GAMBLE

Clerk,

United States Board of Tax
Appeals.

[Endorsed]: No. 10167. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Columbia National Bank, a corporation, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed June 16, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of
Appeals for the Ninth Circuit

No. 10167

GUY T. HELVERING, Commissioner of Internal
Revenue,

Petitioner on Review,

vs.

COLUMBIA NATIONAL BANK,

Respondent on Review.

PETITIONER'S DESIGNATION OF THE
PARTS OF THE RECORD TO BE PRINTED

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

Guy T. Helvering, Commissioner of Internal Revenue, the petitioner on review herein, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, pursuant to his petition for review of the decision of the United States Board of Tax Appeals entered February 26, 1942, designates the parts of the record considered material to the questions on review to be included in the printed transcript of the record, as follows:

1. Docket entries of all proceedings before the Board.
2. Pleadings before the Board:
 - (a) Second Amended Petition, includ-

ing copy of deficiency letter (Exhibit A) and Exhibit B, attached.

(b) Answer to Second Amended Petition.

3. Stipulation of Facts, including Exhibit A, attached.

4. Memorandum Opinion and Decision.

5. Petition for Review, together with proof of service of notice of filing and of service of a copy of petition for review.

6. Statement of Evidence, with Petitioner's Exhibit 2.

7. Statement of Points.

8. Petitioner's Designation of the Parts of the Record to be Printed.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Counsel for Petitioner on
Review.

Service of a copy of the within designation is hereby admitted this 28th day of May, 1942.

JOHN F. WATSON
THOMAS P. GOSE
Counsel for Respondent on
Review.

[Endorsed]: Filed Jun. 17, 1942. Paul P. O'Brien,
Clerk.

No. 10167

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

COLUMBIA NATIONAL BANK, A CORPORATION, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

SAMUEL O. CLARK, Jr.,

Assistant Attorney General.

SEWALL KEY,

HELEN R. CARLOSS,

LOUISE FOSTER,

Special Assistants to the Attorney General.

FILED

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PAUL C. URBAN

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10167

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

COLUMBIA NATIONAL BANK, A CORPORATION, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS*

BRIEF FOR THE PETITIONER

OPINION BELOW

The memorandum opinion of the Board of Tax Appeals (R. 19-20) is not officially reported.

JURISDICTION

This review involves income tax for 1939. (R. 22-23.) The Commissioner's deficiency letter to the taxpayer was issued on November 22, 1940 (R. 9-10), and a petition to the Board of Tax Appeals was filed by the taxpayer on February 10, 1941 (R. 1), which was within the period allowed by Section 272 (a) (1) of the Internal Revenue Code. This review is taken from the Board's decision entered February 26, 1942, allowing a deficiency of \$13.14. (R. 20.) The peti-

tion for review by this Court was filed May 15, 1942 (R. 21-25), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether the taxpayer is subject to income tax on amounts recovered in 1939 on debts which were charged off as worthless and deducted on its income tax returns for five prior years.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from * * * the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * (U. S. C. 1940 ed., Title 26, Sec. 22.)

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period. (U. S. C. 1940 ed., Title 26, Sec. 42.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.23 (k)-1. *Bad debts.*—* * *

* * *

Any amount subsequently received on account of a bad debt or on account of a part of such debt previously charged off and allowed as a deduction for income tax purposes, must be included in gross income for the taxable year in which received. * * *

* * *

SEC. 19.42-1. *When included in gross income.*—* * * Bad debts or accounts charged off subsequent to March 1, 1913, because of the fact that they were determined to be worthless, which are subsequently recovered, whether or not by suit, constitute income for the year in which recovered, regardless of the date when the amounts were charged off. * * *

STATEMENT

The Board of Tax Appeals found that the Commissioner determined a deficiency of \$1,921.92 in the taxpayer's income tax for 1939 by including in its gross income the amount of \$11,568.39, which was recovered in that year from debts charged off and deducted in 1930, 1934, 1935, 1936 and 1937; and that the total amount of debts charged off in those earlier years was greater than the net losses sustained in such years. (R. 19.)

The pertinent figures, covering these years, were stipulated by the parties and adopted by the Board. (R. 19.) They are as follows (R. 16):

Years	Debts charged off	Net losses
1930.....	\$98,674.20	\$43,634.92
1934.....	91,394.63	89,529.75
1935.....	17,968.90	7,487.59
1936.....	26,889.70	3,758.83
1937.....	31,705.87	12,621.71

The recoveries which the taxpayer made in 1939 on the above debts were as follows (R. 16):

On bad debts charged off in 1930.....	\$7,699.20
“ “ “ “ “ “ 1934.....	1,512.61
“ “ “ “ “ “ 1935.....	25.00
“ “ “ “ “ “ 1936.....	1,291.58
“ “ “ “ “ “ 1937.....	1,070.00

Total..... \$11,568.39

The Board held that the above sums recovered in 1939 were not taxable and so held that there was a deficiency of only \$13.14 in income tax for that year. (R. 20.)

STATEMENT OF POINTS TO BE URGED

1. The Board erred in failing to hold that the amount of \$11,568.39 recovered by the taxpayer in 1939 on account of bad debt losses claimed and allowed as deductions from gross income in determining income tax liabilities for prior years constituted taxable income for the calendar year 1939.

2. The Board erred in failing to enter a decision determining that there is a deficiency in income tax in the amount of \$1,921.92 for the calendar year 1939.

SUMMARY OF ARGUMENT

It is well settled that where amounts are previously deducted for bad debts, recoveries in later years on account of such deductions are returnable as a part of gross income for the year in which recovered.

Thus, the Board erred in deciding that the sums recovered here in the taxable year did not constitute taxable income. In order to apply the above rule, it is not necessary to show that the taxpayer had net income after taking the deductions and that it received a tax benefit from such deductions. Accordingly, it is not material that net losses were sustained here in the years that the debts were deducted. However, the Board considered such net losses a controlling factor and the effect of its decision is to allow the taxpayer to carry over such losses to the year of recovery, and to offset the losses against the amounts recovered. No statutory provision authorizes such treatment for net losses, and the taxpayer should not be allowed to take what amounts to a deduction in the taxable year when there is no specific authority for such action.

Furthermore, while these debts were first treated as assets, they were charged off and deducted in prior years. Thus, the taxpayer elected to eliminate them from its capital account and so the recoveries in the taxable year were received as income for tax purposes. This view is in accord with the established practice of treating each year as an independent unit.

ARGUMENT

The Board erred in holding that the sums recovered in the taxable year on bad debts charged off and deducted in prior years were not subject to income tax

The only question here is whether the sum of \$11,568.39, which the taxpayer recovered in 1939 on debts charged off and deducted as worthless in several

prior years, should be treated as taxable income in 1939. For many years the Treasury Regulations have provided that amounts recovered on bad debts previously deducted must be included in gross income in the year of recovery. See Section 19.23 (k)-1 and Section 19.42-1 of Treasury Regulations 103, *supra*; also see Article 52 of Treasury Regulations 45, Article 151 of Treasury Regulations 62, 65 and 69, Article 33 of Treasury Regulations 74 and 77, Article 23 (k)-1 of Treasury Regulations 86 and 94, and Article 23 (k)-1(b) of Treasury Regulations 101. These regulations are valid and come well within the statutory definition of gross income. *Commissioner v. State-Planters Bank & Trust Co.* (C. C. A. 4th), decided August 18, 1942 (1942 C. C. H., Par. 9633); *Commissioner v. Liberty Bank & Trust Co.*, 59 F. 2d 320 (C. C. A. 6th); *Askin & Marine Co. v. Commissioner*, 66 F. 2d 776 (C. C. A. 2d). The principle announced in these regulations has also been approved in other decisions. *S. Rossin & Sons v. Commissioner*, 113 F. 2d 652 (C. C. A. 2d); *Putnam Nat. Bank v. Commissioner*, 50 F. 2d 158 (C. C. A. 5th).

Although the above regulations contain no qualifying provisions, it will doubtless be argued here, as it was in the *State-Planters Bank* case, that the general language of the regulations must be interpreted as meaning that such recovered sums can be included in gross income only when the prior debt deductions have resulted in a tax benefit to the taxpayer. In other words, when net losses are sustained in the year that the deductions are taken, it has been argued that

subsequent recoveries are not taxable. That is, in effect, the holding of the Board in the instant case. But the court held in the *State-Planters Bank* case, which also involved net losses, that such an interpretation of the regulations is unwarranted since there is nothing therein or in any statute which makes the taxability of recoveries on bad debts dependent upon whether a tax benefit has resulted from the prior deductions. In so holding, the court gave an explanation of the basic theory of such cases, which we quote here in full since it is a clear expression of our position in the instant case. It said:

It is to be noted that only where the bad debt has been charged off and allowed as a deduction is it to be included in income when collected. The taxpayer is thus given an option by the statute and, only where he exercises the option, is he required to account for the collection as income. Where he does exercise it, however, by charging off the debt as worthless in his return, he is bound by the election so made. * * * When he collects the debt thereafter he must account for the collection as income; for by electing to charge it off, he is precluded from treating it as capital or its collection as the restoration of capital and under the existing regulation impliedly consents that it be treated as income. When a debt has thus been charged off in one year and collected in a subsequent year, the fact that such charge off did or did not result in tax benefit cannot be considered in connection with the taxability of its collection as income both because the taxability is determined by the

charge off and not by the tax benefit accruing therefrom and because each taxable year must be regarded as an independent unit for income tax purposes. *Burnet v. Sanford & Brooks Co.* 282 U. S. 359.

In rejecting the contention that a bad debt constitutes a capital loss and that any recovery thereon is merely a restoration of capital, the court stated further that—

This, however, not only ignores the fact that the taxpayer elects, by charging off the debt, to eliminate it as a capital item and treat any possible collection of it as income, but, in the case of a business, is clearly contrary to proper accounting theory and practice. Bad debts are ordinarily treated as operating expense of a business in arriving at net operating gain or loss; and consequently a recovery on debts previously charged off is properly treated as income rather than as a return of capital, irrespective of what effect the charge off may have had upon income tax. The statutory provision for deduction of bad debts and the regulation requiring subsequent recovery thereon to be included in gross income is but recognition of this well established accounting practice. * * *

Thus, it is our position that since the taxpayer charged off the debts involved here and deducted them on its income tax returns, it made an election to eliminate such debts from its capital account¹ and

¹ From testimony of taxpayer's witness, it actually appears that its treatment of the debts is in accord with our position. (R. 36, 40.)

any subsequent collections thereon must be treated as income. Also in accord, see *Stearns Coal & Lumber Co. v. Glenn*, 42 F. Supp. 28 (W. D. Ky.), pending on taxpayer's appeal in the Circuit Court of Appeals for the Sixth Circuit, and G. C. M. 22163, 1940-2 Cum. Bull. 76.²

As further support for our position here, we call attention to the fact that all revenue statutes have uniformly assessed income tax on the basis of annual returns. This means that each year is to be treated as an independent unit in computing income tax. *Burnet v. Sanford & Brooks Co.*, 282 U. S. 359. Consequently, the question of a tax benefit in the year a deduction is taken for a bad debt cannot properly be considered in determining whether recoveries on such debt in a later year are to be included in gross income.

² As to the proper accounting practice relative to bad debts, the above ruling states (p. 79):

Bad debts charged off in any business are deductible under a specific provision of the Revenue Acts rather than as ordinary and necessary business expenses. They are, nevertheless, under well-established accounting practices, recognized as operating expenses of the business deductible as such in arriving at the net operating gain or loss for the periods involved. See Finney, *Principles of Accounting*, 1934 Edition, Volume I, page 37, and Kester, *Principles of Accounting*, Fourth Edition, pages 46, 116, and 554. Consequently, the amount represented by debts which become worthless and are charged off in the carrying on of a trade or business is not to be considered as an investment of capital which must first be returned in full before taxable income is derived. Under this principle, amounts recovered in any taxable year upon debts previously charged off and allowed as a deduction should be treated as taxable income regardless of whether the prior allowance of the deduction resulted in a tax benefit to the taxpayer.

The amount recovered in the case of *Sanford & Brooks Co.* related to construction losses deducted in several prior years. There the taxpayer had entered into a dredging contract with the United States and had performed under the contract for four years, but after its tax returns for 1913, 1915 and 1916 showed net losses, it brought suit against the United States to recover the difference between the amounts received under the contract and the amounts it had spent in carrying on its work. A judgment was entered in favor of the taxpayer in 1920 for an amount equal to that which it was claiming, plus interest. The taxpayer contended that the former amount was not taxable because it represented merely a return of the earlier losses, but the Supreme Court decided that such sum was taxable. The Court said (pp. 364-365):

That such receipts from the conduct of a business enterprise are to be included in the taxpayer's return as a part of gross income, regardless of whether the particular transaction results in net profit, sufficiently appears from the quoted words of § 213 (a) and from the character of the deductions allowed.

* * * The excess of gross income over deductions did not any the less constitute net income for the taxable period because respondent, in an earlier period, suffered net losses in the conduct of its business which were in some measure attributable to expenditures made to produce the net income of the later period.

* * * * *

A taxpayer may be in receipt of net income in one year and not in another. The net result

of the two years, if combined in a single taxable period, might still be a loss; but it has never been supposed that that fact would relieve him from a tax on the first, or that it affords any reason for postponing the assessment of the tax until the end of a lifetime, or for some other indefinite period, to ascertain more precisely whether the final outcome of the period, or of a given transaction, will be a gain or a loss.

While the Supreme Court indicated there that net losses could not be carried forward to be offset against income received several years later, that is the effect of the Board's decision here. In other words, the actual result of the Board's holding is that net losses which were sustained by the taxpayer in 1930, 1934, 1935, 1936 and 1937 can be carried over to 1939 and then offset against the amount recovered in that year. No revenue statute has ever allowed net losses to be carried over for more than two years or in such a manner, and some have made no allowance whatsoever for net losses. Thus, since Congress has provided for net losses in some statutes and omitted such provisions from others, it may not be assumed that any loss can be carried over in the absence of specific authorization or that the same result may be indirectly accomplished by allowing a net loss in some prior year to be carried forward to whatever future time that a recovery may be made on a debt and then offset the recovered sum and prevent its being treated as income.³

³ Section 114 of the pending Revenue Bill of 1942 proposes an amendment to the definition of gross income in Section 22 of the Internal Revenue Code, which will exclude recoveries on previ-

Application of the rule contended for by the taxpayer and adopted by the Board is moreover based on the false assumption that the mere fact that a taxpayer sustained a net loss in the earlier year means that it derived no tax benefit in that year. But that is obviously not always the case. For instance, where the deductions for bad debts exceed the net losses, which is the situation here, the taxpayer does derive a benefit. In the instant case, the taxpayer actually offset a portion of the debt deductions in each year by gross income and was benefited to that extent. Moreover, the sums recovered in the taxable year on these various charge offs were in each instance smaller than the amount by which the taxpayer was benefited in the prior years.⁴ Accordingly, if actual benefit from a deduction ought to be the criterion, then why is the taxpayer here not liable under its own contention for tax upon the total of its recoveries as a

ously deducted bad debts when the prior deduction did not result in a reduction of the taxpayer's income tax. The proposed amendment provides further that the amount of the recovery to be excluded shall be determined in accordance with regulations prescribed by the Commissioner with the approval of the Secretary of the Treasury. The amendment is to be retroactive.

To what extent and in what manner, the proposed legislation might affect the instant case is not known at this time.

⁴ To what extent the taxpayer was actually benefited by the deductions is illustrated by the figures for the year 1930, which is typical of the other years. The record shows (R. 16)—

Total debt charge off, 1930-----	\$98, 674. 20
Net loss for 1930-----	43, 634. 92
<hr/>	
Actual benefit -----	\$55, 039. 28
Amount recovered on 1930 charge off-----	7, 699. 20
<hr/>	
Excess after recovery is subtracted-----	\$48, 340. 08

sum in excess of the total recovered was actually subtracted in prior years from its gross income? Certainly it is difficult to see why it should be held, as the Board has done, that the full amount of the net losses must be recovered before any portion of the sums charged off can be included in gross income. Such a holding is, as we have indicated, an allowance of net losses without statutory authority.

The application of the net loss test to determine whether or not a tax benefit was secured also involves another fallacy, namely, that the bad debt deduction is the last deduction taken on the return and so is the cause of the net loss. As a taxpayer usually has several kinds of deductions, and as there is no rule of priority which requires gross income to be offset first by deductions not relating to bad debts, a net loss is obviously not the result of one deduction, but of several. Consequently, if we are required to determine whether a taxpayer has secured any tax benefit from a debt deduction, some method of prorating a net loss among all the deductions should be adopted. While such a rule would be confusing and difficult to administer, it would seem to be necessary if the tax benefit theory is to be fairly applied. Cf. dissenting opinion in *Kennedy Laundry Co. v. Commissioner*, 46 B. T. A. 70, 76, pending on appeal in the Circuit Court of Appeals for the Seventh Circuit.

We submit that these illustrations suffice to show that the tax benefit theory, as applied by the Board, is wholly illogical and that the correct view is that the taxpayer has elected, by its deductions for bad debts, to treat any recoveries as income when received.

In taking a contrary view here, the Board relied on five of its own decisions. (R. 19.) One of these is *State-Planters Bank & Trust Co. v. Commissioner*, 45 B. T. A. 630, which has since been reversed. Thus, as we have already indicated, that decision is in our favor.

Another case which the Board cites is *National Bank of Commerce v. Commissioner*, 40 B. T. A. 72, affirmed by this Court, 115 F. 2d 875, but that case involved different facts and the statutory provisions covering reorganizations. As a part of a reorganization, six banks had conveyed all of their assets to another bank which assumed all of their liabilities. Thereafter, the transferee bank recovered on certain debts which the transferors had already charged off and had deducted in years when the latter had sustained net losses. The transferee bank contended that it was not taxable on the sums recovered because such sums represented a return of its capital. In considering this situation, this Court discussed the regulations relied on herein and gave its approval of them. It also pointed out that if the recoveries had been made by the transferors, the entire amount would of necessity have been included in their returns as income, since the debts involved had been charged off and deducted in prior years. But the Court stated further that since the transferee acquired its right to recover on the transferors' debts by purchase, it was not in the same position as the original debtors or transferors, and so held that the sum recovered by the transferee could be taxed only to the extent of the amount received in excess of cost.

However, this Court found that the debts, having been charged off of the transferors' books prior to the reorganization, had cost the transferee nothing, and so held that the latter was taxable on the whole amount recovered. Thus, such holding, to the extent that it is in point, actually supports our contention here, for it indicated very clearly that loans which have been charged off and deducted by a creditor are no longer capital assets and recovery thereon must be treated as income.

Such was also originally the view of the Board. See *Lake View Trust and Savings Bank v. Commissioner*, 27 B. T. A. 290. The change in the Board's views on this question may be due to two rulings of the Treasury Department which were in effect for a brief time and which held that when deductions were not offset by taxable income the subsequent recovery should not be taxed. But those rulings have been superseded by G. C. M. 22163, *supra*, which holds that an offset of taxable income is not necessary, and that the correct view was that expressed in *Lake View Trust and Savings Bank v. Commissioner*, *supra*.

CONCLUSION

The Board's decision is erroneous and should be reversed.

Respectfully submitted.

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Special Assistants to the Attorney General.

SEPTEMBER, 1942.

No. 10167

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

COLUMBIA NATIONAL BANK, A CORPORATION, RESPONDENT.

*ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED STATES
BOARD OF TAX APPEALS*

BRIEF FOR THE RESPONDENT

THOMAS P. GOSE,
JOHN F. WATSON,
Counsel for Respondent.

FILED

OCT 19 1942

**PAUL P. O'BRIEN,
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**In the United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

No. 10167

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

COLUMBIA NATIONAL BANK, A CORPORATION, RESPONDENT.

BRIEF FOR RESPONDENT

STATEMENT

The bad debts collected in 1939 were bank loans of capital assets made to customers in the regular course of business and afterward charged off as worthless at the request of the National Bank Examiner (R. 34, 35, 37, 41,) resulting in such impairment of the Bank's capital structure as to make necessary a voluntary assessment of shareholders and also a reduction of capital stock in the sum of \$50,000 (R. 38-40). The recoveries in each instance were much less than the net loss as shown by taxpayer's income tax return for the charge-off year (R. 16). Taxpayer's books of account have been kept and income tax returns made on a cash basis. (R. 17).

SUMMARY OF ARGUMENT

Respondent maintains that the decision of the Board of Tax Appeals should be affirmed because:

1. The bad debt recovery was not taxable as income

as its deduction in charge-off year had not resulted in any tax benefit.

2. The bad debt recovery was not income as that term is used in the Acts of Congress but was a capital recovery.

3. The bad debt recovery was not income as that term is used in the Sixteenth Amendment, and any Act of Congress or Treasury Regulation calling for the taxation of same as income would be unconstitutional.

ARGUMENT

I

The case of *Helvering v. State-Planters Bank and Trust Company*, decided by the Fourth Circuit Court of Appeals August 18, 1942, if it is to control, leaves little to be said for Respondent on the subject of non-taxable bad debt recoveries under the present Statutes and Regulations. That Court sees no difference in principle between recovery of a debt where the deduction in the charge-off year gave no tax benefit, and a recovery where the deduction had resulted in a reduction of the tax. The doctrines of election and estoppel are applied as a basis for the decision. We believe it very doubtful that the facts in the *State-Planters* case justified the application of either doctrine. At any rate they cannot properly be applied in the instant case. Respondent Bank had no choice or election or option. The Bank Examiner said the items were to be charged off—and that was all there was to it. The taxpayer in reporting these charge-offs as deductions was merely complying with the command of the law. That should not be construed as an estoppel. The deduction having resulted in no tax benefit to the taxpayer and no loss of revenue to the Treasury Department, the element of adverse effect is wholly lacking.

United States v. Scott and Sons, 1934—C. C. A. 1, 69 Fed. (2d) 728, 732.

The cases cited as authority for the position taken by the Circuit Court of Appeals in the Fourth Circuit do not, as we read them, fully support the Court's position. In *Putnam National Bank v. Commissioner*, 50 Fed. (2d) 158, it does not appear that there had been no tax benefit from the deductions.

In *Commissioner v. Liberty Bank and Trust Co.*, 59 Fed. (2d) 320, it appears affirmatively that there was a tax benefit. The Court says, (p. 324):

"The Commissioner contends that the taxpayer, having asserted in its returns for the former years that the debts were ascertained to be worthless and charged off, and having received the benefit of such assertion, is now estopped." etc."

In *Askin and Marine Co. v. Commissioner*, 66 Fed. (2d) 776, it seems to have been assumed that there had been a tax benefit and that therefore the taxpayer was estopped. It also appears that the taxpayer's books of account had been so kept as to put it on what amounted to an accrual basis.

In *Rossin & Sons v. Commissioner*, 113 Fed. (2d) 652, the taxpayer kept its books on an accrual basis and it does not appear that there had been no tax benefit from the charge-off.

Under the decision of the State-Planters case the taxpayer is to be penalized any way he turns. If he fails to report the charge-off as a deduction in the charge-off year, it is lost to him forever and he pays income taxes which he does not rightfully owe, and, in addition, has no assurance that he will not be required to pay income taxes on all later recoveries. If he does deduct, he thereby incurs a tax on all later recoveries—a

tax many times larger than that saved by the deduction. The State-Planters case entirely overlooks the sense in which the words "allowed as a deduction" are used in the Statutes and Regulations. The mere reporting in income tax returns of charge-off items as losses does not constitute them a deduction or call for their allowance as such until applied to reduce something. For instance, in 1930, the taxpayer reported charge-offs of \$98,674.20 but used only \$55,039.28 as a deduction for tax purposes. In other words, \$43,634.92 of the charge-offs were not deducted from anything nor allowed as a deduction against any income. Of course we have here two conflicting theories. Petitioner in his brief (P. 12) figures like this:

Total debt charge-off	\$98,674.20
Net loss for year of charge-off	43,634.92
Tax benefit	\$55,039.28

and would apply all subsequent recoveries against this tax benefit figure and tax same until it has been used up. He just naturally thinks in terms of getting revenue. The taxpayer, however, figures like this:

Total debt charge-off	\$98,674.20
Portion used to reduce tax	55,039.28
Amount not used as a deduction against taxes	\$43,634.92

and would apply all subsequent recoveries against this figure as tax free until same has been used up. The taxpayer naturally thinks that it should be fair to itself, particularly when there is neither gain nor profit for the Bank in any recovery, even though not taxed at all. As between the two theories, it is submitted that the Court should favor the one most consonant with equity, (*Helvering v. Lazarus & Co.*, 308 U. S. 252, 84 L. ed. 226, 230), and any doubt should be resolved in favor of the taxpayer. *Old Colony R. R. Co., v. Commissioner*, 284 U. S. 552, 76 L. ed. 484.

Burnet v. Sanford and Brooks Co., 282 U. S. 359, 75 L. ed. 383, is used in G. C. M. 22163 (Prentice Hall Inc.—

Fed. Tax Serv. 1940, Par. 66252) (appendix herein, p. 13) and in the State-Planters case on which to build a doctrine under which no business concern can long survive during fluctuating conditions such as we have experienced in the last twelve years. To fasten on them the rule of the "annual period" and treat bad debt charge-offs as ordinary business expenses will certainly kill the tax goose. Justice Stone in *Burnet v. Sanford*, supra, intended no such application of the rule. He was referring to the recovery of expenses incurred and paid in the course of performance of work under contract as being different from recovery of capital investments. He says: "They were not capital investments, the cost of which, if converted, must first be restored from the proceeds before there is a capital gain taxable as income." (Cit. *Doyle v. Mitchell Bros. Co.* 247 U. S. 179, 62 L. ed. 1054, 1059). In the Doyle case the Court said: "In order to determine whether there has been gain or loss and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration." The point with which the decision of *Burnet v. Sanford*, supra, dealt was the year in which the recovery was taxable. Here we are dealing not with income but with capital and the only question is whether the taxpayer has impliedly agreed that it shall be taxed as though it were income. Continuity in income reporting and taxation, as well as the exigencies of the banking business and practical accounting require projection from one year into one or more succeeding years. *Nat. Bank of San Antonio v. Commissioner*, 95 Fed. (2d) 622. It is significant that in the statutory definition of gross income (26 U. S. C. A. Sec. 22) quoted on page 2 of Petitioner's brief, the word income is used in the sense

of gains or profits. There can be no gain or profit in recovering a bad debt, except only as one has used same to reduce taxes.

11

The bad debt recovery was not income as that term is used in the Acts of Congress but was a capital recovery. As pointed out above, the Respondent takes the position that the recoveries in question being far less in each instance than the net loss of the charge-off year have never been "allowed as a deduction" against income. The only basis for the Commissioner's deficiency assessment must be found in the Rules and Regulations and Opinions promulgated by the Treasury Department. Where is the statute which says that any bad debt recovery is income or is taxable as such? Petitioner in his brief cites none. The Court in the State-Planters case refers only to the statute (26 U. S. C. A. 23. (k) (1)) providing for the use of charge-offs as deductions and then turns to the Treasury Regulations to find anything authorizing such a tax. But even under the Regulations, the only recoveries held to be taxable are recoveries previously "allowed as a deduction" against income. The language of the Regulation (Sec. 19.23 (k)-1.(b), is as follows: "Any amount subsequently received on account of a bad debt or on account of a part of such debt previously charged off *and allowed as a deduction for income tax purposes*, must be included in gross income for the taxable year in which received." The Secretary of the Treasury cannot by Regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. *Morrill v. Jones*, 106 U. S. 466, 27 L. ed. 267. The only authority conferred or which could be conferred by the

Statute is to make Regulations to carry out the purpose of the Act—not to amend it. *Miller v. U. S.* 294 U. S. 435, 79 L. ed. 977, text 981. It can hardly be contended that in the matter of taxation of bad debt recoveries the Rules and Regulations of the Treasury Department are entitled to any respect as being consistent and well-settled. The following administrative history is taken from the opinion of the Federal District Court for the Eastern District of Pennsylvania in the case of *Philadelphia National Bank v. Rothensies* (Mar. 1942) 43 Fed. Supp. 923:

“Prior to 1937 the Bureau of Internal Revenue had held that amounts subsequently recovered on account of debts previously charged off and allowed as a deduction for income tax purposes must be included as gross income for the year in which received, whether or not the prior allowance of the deduction had resulted in a benefit to the taxpayer. This view had been sustained by the Board of Tax Appeals in *Lake View Trust and Savings Bank v. Commissioner*, 27 B. T. A. 290 (1932). However, in 1937, the Bureau promulgated G. C. M. 18525 (modified later by G. C. M. 20854, to cover the case of voluntary charge-offs by banks) and in 1939 acquiesced in two decisions of the Board of Tax Appeals which held that subsequent recoveries were to be included as income in the year of recovery only if the earlier deductions had accomplished a reduction in tax liability. See *Central Loan & Investment Co. v. Commissioner*, 29 B. T. A. 981, and *National Bank of Commerce of Seattle v. Commissioner*, 40 B. T. A. 72.

“In 1940 the Bureau, by G. C. M. 22163, again

reversed its position, revoked the earlier rulings, and withdrew the acquiescences. G. C. M. 22163 ruled that the recoveries constituted taxable income whether or not the prior allowance of the deduction had resulted in any tax benefit to the taxpayer."

In that case it was held that the recovery was not income but capital and that the only conditions under which same might be taxable would be when used as a deduction to reduce taxes, on the theory that the taxpayer would be thereby estopped. In reaching this conclusion the Court said:

"I think that it must be agreed that the repayment of a debt is a return of capital. To my mind, no process of reasoning can make it anything else. Being in fact capital, it does not become income merely because it is not returned as agreed or when expected, or even if the owner concludes in his own mind that he will never get it again. To justify a tax upon the repayment of of a debt by referring it to the statutory definition of gross income would undoubtedly extend the statute beyond the constitutional powers of Congress.

"But a taxpayer may voluntarily submit to an otherwise illegal or unconstitutional imposition, and, if it is a condition of some benefit which is tendered to him, his acquiescence will be assumed or implied from his acceptance of the benefit. Deductions allowed by law from gross income are not matters of right but of grace. When a taxpayer claims and is allowed a bad debt against his taxable income there is no difficulty in finding an implied consent to be

taxed in respect of future recovery of the bad debt, whether or not it is actually income. Whether this be called an implied agreement of waiver for valid consideration or an estoppel, is not of great importance."

Petitioner's Chief Counsel in 1939 promulgated G. C. M. 20854 in which he had this to say:

"It is well settled that in the ordinary case amounts received in repayment of loans do not constitute income but are reimbursements of capital. (*Charles M. Howell, Admr.*, 21 B. T. A., 757, petition to review dismissed on motion of the Commissioner, *Burnet v. Howell, Admr.*, 59 Fed. (2d) 1053.) * * * * Unless a taxpayer has already recovered his capital for income tax purposes, recoveries with respect to a debt, in the opinion of this office, can not be considered as income.

"In any case in which a bad debt has been allowed as a deduction and has had the effect of offsetting taxable income (meaning, for present purposes, income which would be the basis for the computation of a tax liability), the taxpayer has, to that extent, in effect had the benefit of a recovery of capital for income tax purposes. In determining the extent, if any, to which a taxpayer has thus benefited, the credits against net income provided in the Revenue Acts must be taken into account. To the extent that a deduction does not result in such a benefit to the taxpayer, the deduction cannot be said to have accomplished a return of capital. Until a taxpayer has had the income tax equivalent of a full return of the capital represented by his debt, there is no

valid ground for treating as income any amount recovered in recovery of the debt. Accordingly the above-quoted provisions of the regulations are not to be interpreted as requiring the inclusion in income of amounts received in recovery of a debt until the taxpayer has fully recovered the capital represented by the debt either by the means referred to above or partly by such means and partly by repayment by the debtor.”

What about the recovery of \$1070 charged off in 1937 without any tax benefit? In a ruling promulgated Dec. 11, 1940, by the Commissioner and approved by the Acting Secretary of the Treasury (Com. Cl. H. Inc. 1941 Tax Service, Par. 6114) he said:

“This office concurs in the view that it would be inequitable to treat, as taxable income, amounts received in recovery of debts previously deducted where the deduction did not result in a tax benefit, if the deduction was taken in an income tax return filed during the period that there was outstanding a published ruling of the Bureau to the effect that amounts received in recovery of debts previously deducted do not constitute taxable income unless the prior deduction resulted in a tax benefit.

“Accordingly, pursuant to authority contained in Section 3791 (b) of the Internal Revenue Code, the ruling contained in G. C. M. 22163, *supra*, will not be applied to recoveries upon debts charged off and deducted by banks or other corporations subject to supervision by Federal authorities (or by State authorities maintaining substantially equivalent standards), where such charge-offs were at the direction of Federal or

State supervisory officers, if the deduction did not result in a reduction of the Federal income tax liability, provided the deduction was taken in an income tax return filed during the period June 28, 1937, to July 8, 1940, during which period G. C. M. 18525, *supra*, remained unmodified."

III

Any Act of Congress or Treasury Regulation for the taxation of these recoveries as income would be unconstitutional. By the Tariff Act of August 15, 1894, Congress undertook to impose a tax on "incomes." The United States Supreme Court in *Pollock v. Farmers' Loan and Trust Company*, 157 U. S. 429, 39 L. ed. 759, 158 U. S. 600, 39 L. ed. 1108, held the Act unconstitutional as imposing a direct tax without apportionment as to census, and in violation of Art. 1, Section 2, Clause 3, and Art. 1, Sec. 9, Clause 4 of the Federal Constitution. Thereafter in 1909 was proposed and in 1913 ratified by the required number of States, the 16th Amendment authorizing Congress to tax "incomes" without apportionment among the several states. So, it is *income* only which can be taxed without apportionment.

"Income within the meaning of the 16th Amendment is the fruit that is born of capital.
* * *. With few exceptions, if any, it is income as the word is known in the common speech of men."

These are the words of the late Justice Cardozo in *U. S. v. Safety Car Heating and L. Co.*, 297 U. S. 88, 80 L. ed. 500, 507. In *Eisner v. McComber*, 252 U. S. 189, 64 L. ed. 521, it was held that, regardless of any attempt on the part of Congress to define it otherwise, the word

“Income” as used in the 16th Amendment is correctly defined in *Doyle v. Mitchell Bros. Co.*, 247 U. S. 179, 62 L. ed. 1054, 1059, as “*gain* derived from capital, from labor, or from both combined.” In *Taft v. Bowers*, 278 U. S. 470, 481, 73 L. ed. 460, 463, the Court said: “The ‘gain derived from capital’ within the definition, is ‘not a gain accruing to capital, nor a growth or increment of value in the investment, but a *gain*, a *profit*, something of exchangeable value proceeding from the property *severed from the capital* however invested, and coming in, that is received or drawn by the claimant for his separate use, benefit and disposal.’ Cit. U. S. *v. Phellis*, 257 U. S. 156, 169, 66 L. ed. 180, 183). If the donor had sold it (stock) at market value, the excess over the capital he invested, (cost) would have been income therefrom and subject to taxation under the 16th Amendment.”

Italics where used in this brief are ours.

Respectfully submitted,

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Counsel for Respondent.

OCTOBER, 1942.

APPENDIX

G. C. M. 22163.

Reconsideration has been given to G.C.M. 18525 (C.B. 1937-1, 80) and G.C.M. 20854 (C.B. 1939-1 (Part 1), 102), both relating to bad debts, with particular attention to the question of the proper treatment for Federal income tax purposes of recoveries of debts charged off and claimed as deductions in prior years.

The last paragraph of G.C.M. 18525, *supra*, reads as follows:

The deductions for bad debts contemplated by the clause "allowed as a deduction for income tax purposes" (as used in (f), (g), (h), and (i) above) refer to deductions for bad debts which accomplished a reduction in tax liability and do not refer to deductions for bad debts in cases in which the taxpayer, on account of other allowable deductions, had no net income irrespective of the deduction for bad debts.

G.C.M. 18525, *supra*, was published to illustrate the application of the provisions of article 191 of Regulations 77 and article 23 (k)-1 of Regulations 86, both as amended by Treasury Decision 4633 (C.B. XV-1, 118 (1936)), and the provisions of the last paragraph of article 23 (k)-1 of Regulations 94, which read as follows:

Where banks or other corporations which are subject to supervision by Federal authorities (or by State authorities maintaining substantially equivalent standards) in obedience to the specific orders of such supervisory officers charge off debts in whole or in part such debts shall be conclusively presumed, for income tax purposes, to be worthless or recoverable only in part, as the case may be, but in order that any amount of the charge-off may be allowed as a deduction for any taxable year it must be shown that the charge-off took place within such taxable year.

The last paragraph of G.C.M. 18525, *supra*, in effect provides that there shall be no adjustment of the basis of a debt as the result of the prior deduction of such debt in whole or in part unless such prior deduction accomplished a reduction in tax liability. The primary purpose of the incorporation of that paragraph in G.C.M. 18525 was to set forth the rule that amounts recovered upon debts deducted in prior years do not constitute taxable income unless such deduction resulted in a reduction in tax liability. Thereafter, in I.T. 3172 (C.B. 1938-1, 150) there was set forth the method for determining the extent of the benefit derived by the deduction of bad debts. That ruling was later modified by I.T. 3256 (C.B. 1939-1 (Part 1), 172), in accordance with the recommenda-

tion contained in G.C.M. 20854, *supra*, which is discussed in the next paragraph of this memorandum.

G.C.M. 18525, *supra*, involved only bad debt deductions by banks or other corporations subject to supervision of Federal or State authorities as a result of the conclusive presumption of partial or total worthlessness established by orders of Federal or State supervisory officers. However, in G.C.M. 20854, *supra*, it was held that the principle stated in G.C.M. 18525, that recoveries of debts previously deducted do not constitute taxable income unless the deduction of the debts in prior years resulted in a reduction in tax liability, is equally applicable in cases of recoveries of debts voluntarily deducted by banks or other corporations subject to Federal or State supervision and to recoveries of debts deducted by other taxpayers. It was held that in any case in which a bad debt has been allowed as a deduction and has had the effect of offsetting taxable income, the taxpayer has, to that extent, in effect had the benefit of a recovery of capital for income tax purposes, but that amounts received in recovery of the debt should not be treated as taxable income until the taxpayer has fully recovered the capital represented by the debt either by such means or partly by such means and partly by repayment by the debtor.

In I.T. 3278 (C.B. 1939-1 (Part 1), 76) the principle of G.C.M. 20854, *supra*, was extended to amounts of State taxes refunded or credited, and it was held that the amount refunded or credited should be treated as taxable income only if and to the extent that it is in excess of the portion of the prior deduction which did not have the effect of offsetting taxable income. That ruling (I.T. 3278) modified Mimeograph 3958 (C.B.XI-2, 33 (1932)) and Mimeograph 4564 (C.B. 1937-1, 93), relating to the taxable status of refunds of customs duties and taxes.

In *Central Loan & Investment Co. v. Commissioner* (39 B.T.A. 981, acquiescence, C.B. 1939-2, 6), the Board of Tax Appeals applied the rule stated in I.T. 3278, *supra*, in reference to taxes, citing in its opinion G.C.M. 18525, *supra*, and G.C.M. 20854, *supra*. In the *National Bank of Commerce of Seattle v. Commissioner* (40 B.T.A. 72, acquiescence, C.B. 1939-2, 26, on recovery of bad debt issue), the Board applied the said rule to bad debts, again citing the above-mentioned General Counsel's memoranda. In neither of these Board of Tax Appeals decisions did the Board refer to its prior decision in *Lake View Trust & Savings Bank v. Commissioner* (27 B.T.A. 290), in which it was held that amounts received in recovery of debts allowed as deductions in prior years constitute taxable income irrespective of whether such prior deductions had the effect of reducing the taxpayer's taxable income.

Section 19.42-1 of Regulations 103, relating to the Internal Revenue Code, provides in part as follows:

* * * Bad debts or accounts charged off subsequent to March 1, 1913, because of the fact that they were determined to be worthless, which are subsequently recovered, whether or not by suit, constitute income for the year in which recovered, regardless of the date when the amounts were charged off. * * *

This regulation has been in effect in all of the income tax regulations of the Treasury Department to the present time.

Section 19.23(k)-1 of Regulations 103 provides in part as follows:

* * * Any amount subsequently received on account of a bad debt or on account of a part of such debt previously charged off and allowed as a deduction for income tax purposes, must be included in gross income for the taxable year in which received. * * *

This regulation has been in effect in all of the income tax regulations of the Treasury department from article 151 of Regulations 62 to the present time.

Prior to the issuance of G.C.M. 18525, *supra*, the Bureau had consistently held that any amount subsequently recovered on account of a debt previously charged off and allowed as a deduction for income tax purposes must be included in gross income for the taxable year in which received, regardless of whether the prior allowance of the deduction resulted in a benefit to the taxpayer. As pointed out heretofore, in the case of Lake View Trust & Savings Bank, *supra*, decided prior to G.C.M. 18525, the Board of Tax Appeals sustained the Bureau practice.

Upon reconsideration, it is now the opinion of this office that the rule sustained in the case of Lake View Trust & Savings Bank, *supra*, is the correct rule to be followed. This conclusion is in accord with the decision of the Supreme Court of the United States in *Burnet v. Sanford & Brooks Co.* (282 U.S., 359, Ct.D. 277, C.B. X-1, 363 (1931)). The taxpayer in *Burnet v. Sanford & Brooks Co.* had entered into a dredging contract with the United States and, after having performed for three years at a large loss, abandoned operations and sued the Government for breach of warranty as to the character of the material to be dredged. Judgment was recovered for \$192,577.59, of which \$176,271.88 was the amount by which its expenses of operation under the contract exceeded receipts from it, and the balance, \$16,305.71, represented accrued interest. During the years of operation the taxpayer had returned as gross income the receipts under the contract and had deducted its expenses paid in performing the contract. For all but one of such years the returns showed net losses. The taxpayer failed to return the amount of the judgment as income in the year of receipt, and the Commissioner, therefore, assessed a deficiency. In upholding the action of the Commissioner, the Supreme Court said in part:

All the Revenue Acts which have been enacted since the adoption of the sixteenth amendment have uniformly assessed the tax on the basis of annual return showing the net result of all the taxpayer's transactions during a fixed accounting period, either the calendar year, or, at the option of the taxpayer, the particular fiscal year which he may adopt. * * *

That the recovery made by respondent in 1920 was gross income for that year within the meaning of these sections can not, we think, be doubted. The money received was derived from a contract entered into in the course of respondent's business operations for profit. While it equaled, and a loose sense was a return of, expenditures made in performing the contract, *still*, as the Board of Tax Appeals found, *the expenditures were made in defraying the expense incurred in the prosecution of the work under the contract, for the purpose of earning profits. They were not capital investments, the cost of which, if converted, must first be restored from the proceeds before there is a capital gain taxable as income.* * * * (Italics supplied.)

Under the principle of the Supreme Court's decision in the Sanford & Brooks Co. case, *supra*, items of expense incurred in carrying on a trade or business do not represent capital investment, the cost of which, if converted, must first be restored before there is a capital gain taxable as income. Bad debts charged off in any business are deductible under a specific provision of the Revenue Acts rather than as ordinary and necessary business expenses. They are, nevertheless, under well-established accounting practices, recognized as operating expenses of the business deductible as such in arriving at the net operating gain or loss for the periods involved. See Finney, *Principles of Accounting*, 1934 Edition, Volume I, page 37, and Kester, *Principles of Accounting*, Fourth Edition, pages 46, 116, and 554. Consequently, the amount represented by debts which become worthless and are charged off in the carrying on of a trade or business is not to be considered as an investment of capital which must first be returned in full before taxable income is derived. Under this principle, amounts recoverable in any taxable year upon debts previously charged off and allowed as a deduction should be treated as taxable income regardless of whether the prior allowance of the deduction resulted in a tax benefit to the taxpayer.

It is the opinion of this office, furthermore, that in the case of a bad debt owing to a taxpayer which has not arisen in connection with the carrying on of a trade or business, the recovery of such a debt where it has been charged off and deducted in a prior year constitutes taxable income irrespective of whether the prior allowance of the deduction resulted in a tax benefit. In *United States v. Ludey* (274 U.S. 295, T.D. 4046, C.B. VI-1, 157 (1927)) it was held that in ascertaining the basis for computing gain or loss in the case of the sale of depletable assets, the original basis thereof must be reduced by the amount of depreciation and depletion allowable as deductions in the years during which the property was held regardless of whether deductions had been claimed. It is to be

observed that the Revenue Act involved in that case did not contain a specific provision requiring such a reduction of basis. It is believed that this case stands for the proposition that, under the broad purposes of the Revenue Acts, a taxpayer is to be charged with having recovered his capital to the extent that the statute permits deductions from gross income on account thereof, regardless of whether the taxpayer took advantage of the deduction privilege provided in the Revenue Acts. See also *Hardwick Realty Co., Inc., v. Commissioner* (29 F. (2d), 498, certiorari dismissed on motion, 279 U.S. 876), in which it was held that depreciation must be deducted in ascertaining the adjusted basis of depreciable property even though deductions for depreciation in the years sustained conferred no tax benefit.

The case of *United States v. Ludey*, *supra*, would seem to indicate that amounts recovered upon a debt, whether or not incurred in business, constitute taxable income if in any prior year such debt constituted an allowable deduction under the applicable Revenue Act, even though such deduction was not claimed and allowed. See S.R. 2940 (C.B. IV-1, 129 (1925)), modified in G.C.M. 20854, *supra*, in which it was held that under article 52 of Regulations 45, article 51 of Regulations 62, and article 50 of Regulations 65, the amount of a debt written off and allowable as a deduction should be treated as income for the year in which actually recovered. However, in view of the fact that all of the regulations beginning with article 151 of Regulations 62, promulgated under the Revenue Act of 1921, have contained the provision that any amount subsequently received on account of a bad debt or on account of a part of such debt "*previously charged off, and allowed as a deduction for income tax purposes*" (italics supplied) must be included in gross income for the taxable year in which received, taxpayers will not be required to return as income any amounts received in recovery of debts except to the extent that such debts have been previously claimed and allowed as deductions. As indicated above, however, if a debt was allowed as a deduction in whole or in part in a prior year, amounts recovered upon such debt constitute taxable income in the year of the recovery to the extent previously allowed as a deduction, *irrespective of whether the allowance of the deduction resulted in a tax benefit to the taxpayer*.

The foregoing is consistent with the manner in which the Bureau computes the gain or deductible expenses to a corporation upon the retirement of its bonds. Section 19.22(a)-18 of Regulations 103 provides that if bonds are issued by a corporation at a discount, the net amount of such discount is deductible and should be prorated or amortized over the life of the bonds. It further provides that if the corporation purchases

any of such bonds at a price in excess of the issuing price plus any amount of discount already deducted, the excess of the purchase price over the issuing price plus any amount of discount already deducted is a deductible expense for the taxable year. It is provided, however, that if the corporation purchases any of such bonds at a price less than the issuing price plus any amount of discount already deducted, the excess of the issuing price, plus any amount of discount already deducted, over the purchase price is gain or income for the taxable year. In computing the income or deductible expense under the regulations, the Bureau has adopted the view that it is immaterial whether the deductions on account of bond discount resulted in a tax benefit to the taxpayer.

In view of the foregoing, G.C.M. 18525, *supra*, is modified by eliminating the last paragraph thereof; G.C.M. 20854, *supra*, is revoked; and S.R. 2940, *supra*, is modified to accord with the view expressed herein. It is recommended that I.T. 3172, *supra*, and I.T. 3256, *supra*, be revoked; that I.T. 3278, *supra*, be modified; and that the acquiescence in *Central Loan & Investment Co. v. Commissioner*, *supra*, and the acquiescence in the *National Bank of Commerce of Seattle v. Commissioner*, *supra*, be withdrawn. (G.C.M. 22163; 1940-28-10324.)

